IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-2025

PAUL TALANDA,

Plaintiff-Appellant,

v.

KFC NATIONAL MANAGEMENT COMPANY,
a Delaware Corporation, doing business as KFC,
also known as KENTUCKY FRIED CHICKEN,
a Delaware Corporation and a subsidiary of
PEPSICO, INC., a North Carolina Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 1668—**John A. Nordberg**, *Judge.*

ARGUED DECEMBER 3, 1997—DECIDED APRIL 7, 1998

Before HARLINGTON WOOD, JR., RIPPLE and DIANE P. WOOD, *Circuit Judges.*

RIPPLE, *Circuit Judge.* After KFC National Management Company ("KFC") terminated Paul Talanda's employment, Mr. Talanda responded by filing this lawsuit. The central allegation, and the only one appealed, was that his retaliatory discharge violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213. Mr. Talanda's employment was terminated a few weeks after he had hired Dorothy Bellson to serve customers at the front counter of

his KFC restaurant. Mr. Talanda hired Bellson knowing that a number of her teeth were missing. His supervisor told him to move Bellson from the front counter position; Mr. Talanda refused and was fired. He claims his termination was in retaliation for his refusal to follow his supervisor's order to move Bellson from the front counter, out of view of the customers, because of her facial disfigurement. His employer, KFC, claims that his termination resulted from his acts of insubordination. The district court granted summary judgment to KFC. For the reasons set forth below, we affirm the judgment of the district court.

I

BACKGROUND

A. *Facts*

Paul Talanda began working for KFC in 1978 as a food service worker. By 1993, he had worked his way up through the ranks to Training Store Manager of the KFC store in McHenry, Illinois.[1] In September of that year, Dorothy Bellson applied for a job in Mr. Talanda's KFC. On her application, she stated that she preferred to work in "cook & prep." However, the only opening in the store at the time was the job of "customer service worker," one who works in the front of the store serving customers and operating the cash register. Even though Mr. Talanda noted that Bellson was missing many teeth, he hired her because her prior experience qualified her for the position

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[1] A Training Store Manager is responsible for managing a KFC restaurant, training assistant managers and teaching orientation classes to new employees. In that position, Mr. Talanda became a President's Club member. Mr. Talanda's performance reviews throughout his years of employment at KFC were consistently favorable; just six weeks before his termination, Mr. Talanda was told that he was a "very solid performer" who met or exceeded expectations. R.71, Ex.D at 4.

and because he believed her friendly, outgoing personality was an asset when greeting customers.

However, Mr. Talanda's supervisor, Market Manager Joanne Overly, was concerned when she saw a person with "serious dental problems" at the front counter. R.71, Ex.G at 1. According to Mr. Talanda, Overly phoned him and stated that she could not believe he had hired someone with missing teeth to work the front counter. Overly's description of the phone conversation suggested a different tone. According to Overly, she offered a business reason,[2] namely Bellson's unprofessional appearance, for wanting Bellson moved from the front counter: "Well, we [KFC] required a lot of smiles and friendliness. And Miss Bellson was missing quite a few teeth." R.71, Ex.E at 28. When Overly told him to move Bellson to a food service position in the back of the restaurant, Mr. Talanda responded that people whose teeth are discolored from smoking would have the same difficulty. He then told Overly that he would "work around it," and meant that he would work around her directive. R.51, Ex.A at 216. Overly believed that Mr. Talanda had agreed to find a different position for Bellson. R.71, Ex.G at 1. However, Mr. Talanda did not change Bellson's duties and did not move her out of the sight of customers.

A day or two later, Mr. Talanda phoned Overly and secretly tape recorded their conversation. He explained that he had worked with Bellson the entire day at the front counter of his store, that she had done a good job,

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[2] Overly wrote a memo documenting her conversations with Mr. Talanda. In it she stated that Bellson's position in front of customers was "not a wise business decision." R.71, Ex.G at 1. At an administrative hearing held December 14, 1993, before the Illinois Department of Employment Security, Overly explained that her request to have Bellson moved was based on the KFC grooming policy and on its smile requirement. She felt that Bellson's smile "was not a professional image that we wanted to portray" and "was not an appetizing situation." R.71, Ex.I at 17-18.

and that he wanted to keep Bellson on the front counter. Overly reiterated her position that Bellson should not work in the front waiting on customers but that she could be a cook or prep person. Overly firmly stated that the issue was not up for discussion and that she would not change her mind. When Overly confirmed that Mr. Talanda could "get in trouble" if he kept Bellson working up front, he agreed to do as she wished.[3] Overly also questioned Mr. Talanda's judgment, stating that she was concerned that he would even consider "having someone like that on your service line . . . because it gives a very bad impression of your restaurant." R.71, Ex.H at 4. When Mr. Talanda pointed out that Bellson was friendly to the customers, Overly responded that it was "really a turn-off to me as a customer to see that mouth. I mean, if she got her teeth fixed, that wouldn't be an issue." *Id.* at 5. Mr. Talanda replied that he understood her position and would work around it.

The next day, Mr. Talanda met Bellson at another location and played for her the recording of the secretly taped phone conversation. When Bellson became upset by it, Mr.

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[3] This part of the conversation was transcribed as follows:

> FEMALE VOICE: I'm not going to change my mind.
>
> MALE VOICE: All right. So, well, you know, if she's working up front then I can get in trouble then right?
>
> FEMALE VOICE: What do you mean you can get in trouble?
>
> MALE VOICE: Well, I mean, if you come in and you see her working up front, you know, if I, you know, and then I do this then I can get in trouble; right?
>
> FEMALE VOICE: Yeah, you can, if that's the way you want to put it.
>
> MALE VOICE: Okay. Well, I don't want to go against your wishes, . . . and if that's how you really feel about it then I won't.

R.71, Ex.H at 4-5.

Talanda told her that Overly's directive was morally wrong and that he would stand up for Bellson. He also informed her that "corporations could be fined money for taking actions like this against their employees." R.50, Ex.A at 247. Bellson agreed to keep working as a customer service worker.

For almost three more weeks, Mr. Talanda ignored Overly's instruction; Bellson continued to work at the front counter. He gave two reasons for disobeying Overly's directive: (1) He thought that the order was morally and legally wrong; and (2) he believed he was being asked to discriminate against Bellson on account of her facial disfigurement. According to KFC, however, Mr. Talanda never suggested to anyone at KFC (except Bellson herself) that he believed Overly's directive was discriminatory and illegal. Over those few weeks, Overly received reports about Mr. Talanda from other employees. The shift supervisor in Mr. Talanda's McHenry restaurant, Nancy DeMarco, told Overly that Bellson was upset and wanted to speak with Overly. Overly learned from Bellson that Mr. Talanda had made the secret tape, that he wanted Bellson to bring a discrimination suit against KFC and its parent company Pepsico, and that he had been pressuring her about filing the lawsuit so that they could make money. Bellson also stated in her affidavit that she told Overly that she "felt harassed by Mr. Talanda getting [her] involved in his set-up of the Company for discrimination." R.50, Ex.D at ¶ 19. Overly learned from Ken Gand, another restaurant manager in her territory, that Mr. Talanda "had something" on Overly and wanted to "get her."[4] R.50 at ¶ 19. The information Overly received over those weeks led her to believe that Mr. Talanda's goals or motives were to urge Bellson to sue KFC and to cause Overly's termination.

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[4] Mr. Talanda denies that he spoke with Ken Gand about his taped conversation with Overly. He also denies that he told Bellson that he would pursue discrimination charges against Overly.

Overly took this information to John Malloy, KFC's Director of Human Resources for the area. They decided that Mr. Talanda's actions were sufficiently serious to warrant termination. However, they called a meeting with him to give him a chance to offer reasons for his actions. When the three met on October 19, 1993, Mr. Talanda admitted that he had refused to obey Overly's directive but gave no explanation for it. Even though Malloy asked him directly for an explanation, Mr. Talanda did not state that he believed Overly's order was illegal or improper.

Mr. Talanda was discharged that day, October 19, 1993. The letter of termination, which Mr. Talanda received from Overly a few days later, described in detail Mr. Talanda's refusal to move Bellson,[5] in defiance of Overly's direction,

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[5] Overly's Memorandum of October 26, 1993, stated:

> Paul, on September 28, 1993, we had a telephone conversation in which I had asked you to remove Dorothy (Dee) Bellson from the front counter. I suggested you place her in another position, either as a prep person or cook. . . . We concluded this conversation with your agreement to remove Dee from the front line, repositioning her . . . .
>
> I received a page from you on September 30th. When I returned your call, you stated that you had worked with Dee on the front line for most of the day. I replied to you that my decision was final about Dee working up front. I told you that I expected you to comply with my direction by finding another position for her to work. You agreed for the second time to do so.
>
> Paul, you directly violated my authority by not removing Dee from the front counter. You in fact, specifically told Dee that she would stay up front regardless of what I said. You told her that if I ever came into the store, she was to go in the back of the restaurant and pretend to be working there. You also disregarded Dee's wishes to be placed elsewhere. She told you that she herself felt uncomfortable waiting on customers due to her severe dental problems.
>
> This behavior is totally unacceptable . . . .

R.51, Ex.J.

and other acts of insubordination.[6] The letter concluded that Mr. Talanda was terminated because he chose not to explain his position or to comment on any of the issues in the meeting with Malloy and Overly.

After receiving a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"), Mr. Talanda filed suit in district court, alleging retaliatory discharge under both the ADA and Illinois law and raising state law claims of breach of contract, promissory estoppel, defamation, false light, tortious interference with a business expectancy and intentional infliction of emotional distress.

B. *Decision of the District Court*

The parties' cross-motions for summary judgment were referred first to a magistrate judge. The Report and Recommendation recommended denial of both parties' motions for summary judgment with respect to the ADA count.[7] The district court accepted only the recommenda-

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[6] The other "acts of insubordination and/or company policy violations" enumerated in the termination letter are these:

1. ignoring Bellson's wishes to be placed elsewhere in the store;
2. tape recording his phone conversation with Overly;
3. refusing to post a MERIT work schedule for employees;
4. not selling the BBQ chicken sandwich as requested;
5. not giving Bellson a new employee test or orientation test;
6. lying to Overly about training Bellson on the register.

R.50, Ex.J. Mr. Talanda addressed and rebutted many of these allegations of insubordination. We focus, as do the parties, on the key issue, Mr. Talanda's refusal to follow Overly's order.

[7] The Report and Recommendation concluded that Mr. Talanda had offered sufficient evidence to create a factual dispute concerning (1) whether he had engaged in a protected activity under the ADA and (2) whether KFC had knowledge of Mr. Talanda's motive for refusing to follow Overly's directive. It also found that KFC had proffered a number of legitimate, nondiscriminatory

(continued...)

tion to deny plaintiff's motion for summary judgment. It then granted summary judgment to KFC on the ADA count and dismissed the remaining common law and state statutory counts without prejudice. According to the district court, the ADA's protection of an employee from an employer's retaliation is available only when the employee has a reasonable belief that he is opposing discrimination. The court found that Mr. Talanda could not reasonably have believed that he was opposing a discriminatory order for two reasons: (1) Bellson was neither a person with a disability nor a person regarded as being disabled; and (2) Overly's order to move Bellson from the front counter to a different job was not an adverse employment action. The court further found unreasonable Mr. Talanda's methods of opposing the order—by failing to carry out Overly's directive without telling her, failing to address the issue with others at KFC, secretly taping Overly's conversation and playing the tape to Bellson and refusing to explain to Malloy and Overly why he refused to carry out the order. Because, in the district court's view, a jury could not find that Mr. Talanda's actions were reasonable, the court held that Mr. Talanda had failed to establish a genuine issue of material fact and that KFC was entitled to judgment as a matter of law.

II
DISCUSSION
A.

We review de novo the district court's entry of summary judgment. *See Harrington v. Rice Lake Weighing Sys., Inc.*,

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[7] (...continued)
grounds for the termination and that Mr. Talanda had created a genuine issue of material fact as to whether those reasons were merely pretextual. With respect to the remaining counts, the magistrate judge's Report and Recommendation concluded that summary judgment should be granted to KFC.

122 F.3d 456, 458 (7th Cir. 1997). Summary judgment is properly granted when the record reflects no genuine issue of material fact and the moving party, in this case KFC, is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Rothman v. Emory Univ.*, 123 F.3d 446, 450 (7th Cir. 1997). The party opposing the motion, in this case Mr. Talanda, can avoid summary judgment only by setting forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Vanasco v. National-Louis Univ.*, No. 97-1717, 1998 WL 81458, at *2 (7th Cir. Feb. 27, 1998). In assessing whether there is a genuine issue of material fact, we are obliged to examine the record in the light most favorable to Mr. Talanda, the party against whom summary judgment was decided, and to grant him the benefit of every reasonable inference that can be drawn from those facts. *See Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 505 (7th Cir. 1998). Summary judgment should be denied if the dispute is "genuine": "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When the case before us is a summary judgment ruling in an employment discrimination case, in which credibility and intent are crucial issues, we review the record with heightened scrutiny. *See Vanasco*, 1998 WL 81458, at *2; *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994).

B.

The ADA is a broadsweeping protective statute requiring the elimination of discrimination against individuals with disabilities. *See* 42 U.S.C. §§ 12101-213; *Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1058 (7th Cir. 1998). Section 12203 of the ADA prohibits acts of retaliation against employees who oppose the discriminatory practices of employers:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 12203(a).

In assessing whether Mr. Talanda has established a discriminatory retaliation claim under the ADA, the case law of Title VII serves as a useful guide because its proscription against retaliation is quite comparable to the ADA's. *See Davidson*, 133 F.3d at 511. An employee demonstrating a prima facie case of retaliation under the ADA, as under Title VII, "must establish that (1) he engaged in statutorily protected expression; (2) he suffered an adverse action; and (3) there is a causal link between the protected expression and the adverse action." *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1459 (7th Cir. 1995) (citing cases). If the employee is successful at that level, to prevail ultimately he "must also rebut the defendants' non-discriminatory reasons for the adverse action and establish that a discriminatory motive was the determining factor behind the defendants' action." *Id.*[8]

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[8] Mr. Talanda urges that this case involves direct evidence of retaliation on the part of KFC. In his view, therefore, he ought to prevail unless KFC can establish that his discharge would have been justified entirely by other reasons. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). We think that this analytical approach is closed to Mr. Talanda. As we explain in the following text, we believe that the district court was correct in determining that Mr. Talanda did not have a reasonable basis for his belief that KFC was engaging in discrimination toward Bellson. Under those circumstances, we think it is clear that Mr. Talanda does not have any direct evidence of retaliation with respect to the underlying employment action.

Therefore, it makes no difference whether we characterize this litigation as involving the "direct" or "indirect" method of estab-

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The district court focused on the first prong of the prima facie case, the requirement that a plaintiff prove that he engaged in statutorily protected expression. The court determined that the statute's protection is not absolute, that it protects only the plaintiff with a reasonable belief that he is opposing discrimination. It then held that Mr. Talanda's conduct was not protected under the statute because it was doubly unreasonable: His belief that he was opposing a discriminatory order was unreasonable and his methods of opposing KFC's actions were also unreasonable.

Many retaliation claims involve an employer's discharge of an employee in retaliation for that employee's filing of an EEOC charge or other employment complaint against the employer.[9] In this case, however, Mr. Talanda contends that KFC discharged him in retaliation for his opposition to an "act . . . made unlawful by this chapter" against *another* employee on the basis of her disability: i.e., his refusal to move the cosmetically disfigured employee, Dorothy Bellson, from the front counter of his KFC restaurant. It is a well-established principle that, to receive protection under the ADA, a plaintiff must have acted "in good faith and *with a reasonable and sincere belief that he or she is opposing unlawful discrimination.*" *Roth*, 57 F.3d at 1459 (emphasis added). Specifically, in retaliation cases, whether under Title VII or the ADA, "it is good faith and reasonableness, not the fact of discrimination, that is the

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[8] (...continued)

lishing retaliation. Under either approach, Mr. Talanda cannot prevail because he has failed to establish that one reasonably can characterize KFC's underlying action toward Bellson as discriminatory.

[9] *See, e.g., Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1014-15 (7th Cir. 1997); *Smart v. Ball State Univ.*, 89 F.3d 437, 440-41 (7th Cir. 1996); *cf. Veprinski v. Fluor Daniel, Inc.*, 87 F.3d 881, 891 (7th Cir. 1996) (post-termination retaliation case).

critical inquiry." *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982).[10]

C.

Mr. Talanda asserts that he reasonably believed that he was opposing unlawful discrimination against Bellson, an individual who, because of her severe facial disfigurement, either had an impairment or was regarded by KFC as having an impairment that constitutes a disability under the ADA. In order for an impairment, actual or perceived, to constitute a disability that is protected under the ADA, however, the impairment must be one that "substantially limits one or more of the major life activities" under the ADA. 42 U.S.C. § 12102(2)(A);[11] *see Homeyer v. Stanley Tulchin Assocs.*, 91 F.3d 959, 961 (7th Cir. 1996). It is this "'major life activities' hurdle, rather than proof of a concrete disability, [that] screens out trivial claims under § 12102(2)(C)." *Johnson v. American Chamber of Commerce Publishers*, 108 F.3d 818, 820 (7th Cir. 1997).

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[10] *See also Hunt-Golliday*, 104 F.3d at 1014; *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1314-15 (7th Cir. 1989); *Jennings v. Tinley Park Community Consol. Sch. Dist. No. 146*, 796 F.2d 962, 967 (7th Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980).

[11] The ADA defines the "disability" of an individual as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. §12102(2); *see also* 29 C.F.R. § 1630.2(g) (defining "disability"); 29 C.F.R. § 1630.2(h) (defining "physical or mental impairment" as "[a]ny physiological disorder, or condition, *cosmetic disfigurement*" (emphasis added)).

Mr. Talanda's case falters at this "major life activities" criterion. "Major life activities" include such functions as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Even when an impairment does affect a major life activity, it will be considered a disability under the ADA "only if the resulting limitation is significant." *Davidson*, 133 F.3d at 506 (citing *Roth*, 57 F.3d at 1454). When considering the major life activity of "working," the EEOC regulations state explicitly that the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). Mr. Talanda therefore must show that he reasonably believed that Bellson was, or was perceived by KFC as, "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.*; *see Davidson*, 133 F.3d at 506 (quoting that regulation); *Homeyer*, 91 F.3d at 961 ("An inability to perform a particular job for a particular employer is not sufficient to establish a substantial limitation on the ability to work; rather, the impairment must substantially limit employment generally." (internal quotations and citations omitted)).

The evidence of record simply will not support Mr. Talanda's contention. Overly objected solely to Bellson's working at the front counter. Her demand that Bellson be moved from that position did not include any limitation on her ability to work at any other job.[12] Notably, nothing in the record suggests that moving her from the front counter was a demotion or an adverse employment action, one that would segregate her or keep her from advancing in the business. Mr. Talanda has offered no evidence from which he reasonably might have inferred that Bellson's missing

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[12] At the hearing before the Illinois Department of Employment Security, Mr. Talanda admitted that he could have accommodated Overly's request that Bellson be moved from the front counter.

teeth precluded her from holding other comparable positions. Indeed, as Mr. Talanda was aware, Bellson herself insisted that she was not disabled and was not substantially limited in her work or her ability to work; in fact, the cook and prep job in the kitchen was the job she preferred. Under these circumstances, Mr. Talanda ought to have realized that Bellson's missing teeth did not limit her in the performance of a major life activity.[13] He also should

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[13] We do not mean to imply that facial disfigurement, including facial disfigurement caused by dental problems, can never be a disability for purposes of the ADA. Such an impairment can be so severe as to limit, or be perceived as limiting, the employee in a major life activity. *See, e.g.*, examples from the EEOC's Appendix to Part 1630, 29 C.F.R. Pt. 1630 App. § 1630.15(a) (noting that disparate treatment occurs when an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee; the employer treated the employee differently because of the employer's attitude toward his perceived impairment); and 29 C.F.R. Pt. 1630 App. § 1630.2(l) (noting that a prominent facial scar or involuntary head jerk may be perceived as an impairment that substantially limits a major life activity when an employer discriminates against the person because of the complaints of customers). As with all impairments, however, it must be established that the impairment limits a major life activity or is perceived as limiting a major life activity. Here, as we discuss in the text, there was no rational basis to support the view that Bellson had, or that KFC perceived her as having, such a severe impairment. *Cf. Johnson v. American Chamber of Commerce Publishers*, 108 F.3d 818, 820 (7th Cir. 1997) (questioning whether, if a plaintiff with missing teeth mumbles, his mumbling "substantially limits one or more of the major life activities"; concluding that mumbling or stuttering would preclude employment as a telemarketer, but many other jobs would remain open).

Mr. Talanda places significant reliance on our decision in *Johnson*. A precise reading of *Johnson*, however, offers no support for Mr. Talanda's contention that he reasonably believed that Bellson's lack of teeth was a disability as that term is defined in the ADA. In *Johnson*, this court reversed the district court's determination that the plaintiff's missing teeth did not rise to the level

(continued...)

have known that Bellson did not perceive herself as the object of discrimination. Therefore, we must conclude that it was unreasonable for Mr. Talanda to believe that KFC regarded and treated Bellson as one who had a physical impairment that substantially limited her in a major life function and then discriminated against her because of that perceived disability.

Mr. Talanda has failed to demonstrate the reasonableness of his belief that Overly's demand was evidence that she regarded and treated Bellson as having an impairment which limited Bellson's major life activity of working. Indeed, the record does not show that Mr. Talanda tried to ascertain, in any reasonable way, whether Overly's order violated the ADA. Nor did Mr. Talanda inform Overly or Malloy that he was refusing to move Bellson in order to protect her from Overly's discriminatory activity. Therefore, KFC's firing of Mr. Talanda for his refusal to move Bellson was not a discriminatory act against Mr. Talanda and was not protected under the ADA.[14]

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[13] (...continued)

of a "cosmetic disfigurement" and therefore that the plaintiff had failed to establish that he had an impairment under the ADA. Our reversal was based on the district court's misapprehension that a person could not be regarded as having a disability unless that person actually had the disability. *Id.* at 819. We therefore made clear that a person need not actually have the impairment to be perceived as having it. As we have pointed out in the text, in this case, as in *Johnson*, in order to fall within the protection of the ADA, the person must be perceived as having an impairment that limits a major life activity.

[14] Because we hold that the record establishes as a matter of law that Mr. Talanda did not have a reasonable basis for believing that KFC had violated the ADA, we need not assess whether Mr. Talanda's methods of protesting Bellson's treatment—his keeping Bellson at the front counter after Overly ordered her moved; secretly recording the phone call with Overly and playing it to Bellson; and failing to explain why he did not carry out Overly's order—were unreasonable.

Conclusion

For the reasons given above, we affirm the district court's judgment granting summary judgment in favor of KFC.

AFFIRMED

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

App. 17

[Dated May 31, 1996]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAUL TALANDA Plaintiff, v. KFC NATIONAL MANAGEMENT COMPANY, a Delaware corporation d/b/a KFC a/k/a Kentucky Fried Chicken, a subsidiary of KFC CORPORATION, a Delaware corporation and a subsidiary of PEPSICO, INC., a North Carolina corporation, Defendant.	)	No. 94 C 1668 Judge John A. Nordberg Magistrate Judge Rebecca R. Pallmeyer

REPORT AND RECOMMENDATION

In September of 1993, Plaintiff Paul Talanda lost his job as manager of a Kentucky Fried Chicken restaurant when he disobeyed an order from his supervisor to remove from customer view an employee who was missing her front teeth. Shortly thereafter, Talanda filed the present action in federal court for equitable and compensatory relief, alleging claims for retaliatory discharge under Illinois law and under the Americans with Disabilities Act, defamation, false light, tortious interference with economic expectancy, and intentional infliction of emotional distress. This court has jurisdiction over the action pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), 1367, and 42 U.S.C. §§ 2000e-5, 12117. Defendant KFC National Management Company has moved for summary judgment on the entire complaint, and Plaintiff Talanda has filed a cross-motion for summary judgment on Count I only. For the reasons set

forth below, Defendant's motion for summary judgment should be granted in part and denied in part, and Talanda's cross-motion for summary judgment should be denied.

BACKGROUND[1]

Defendant KFC National Management Company ("KFC") is a Delaware corporation that does business and maintains property, including a number of Kentucky Fried Chicken restaurants, in the Northern District of Illinois. (Rule 12(m) Statement of Undisputed Facts (hereinafter "KFC's 12(M) Statement") ¶ 2.) Plaintiff Paul Talanda, an Illinois resident, was originally hired by KFC in 1978 as a food service worker in a KFC restaurant. (*Id.* ¶ 3.) KFC promoted Talanda to the position of Store Manager in 1984, and to the position of Training Store Manager in 1986. (*Id.* ¶ 4.) As a Training Store Manager (the position that Talanda held at all times relevant to this suit), Talanda was responsible for managing a KFC restaurant, training assistant managers, and teaching orientation classes to new employees. (*Id.* ¶¶ 4, 6.) Throughout the course of his employment with KFC, Talanda received reviews marking him at "meets or exceeds expectations." (Plaintiff's Rule 12(M) Statement of Material Facts Which Are Not in Dispute (hereinafter "Talanda's 12(M) Statement") ¶ 3.) In a review that took place just six weeks prior to his termination, KFC characterized Talanda as "a very solid performer." (*Id.* ¶ 4.)

In late August 1993, Dorothy Bellson applied for employment at Talanda's store and indicated her prefer-

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[1] The facts that follow are taken from the parties' Local Rule 12(M) and 12(N) statements, supplemented where necessary with the underlying depositions and affidavits attached thereto.

ence to work as a "cook & prep" person. (KFC's 12(M) Statement ¶8.) A position for a customer service worker[2] at Talanda's store opened up in September, and Talanda chose to hire Bellson for this position after conducting a brief interview. (*Id.* ¶ 9; Talanda's 12(M) Statement ¶¶ 8, 9.) Talanda noted that Bellson was missing several teeth as the result of a recent automobile accident, but hired her for the customer service position, allegedly because he felt her friendly and outgoing personality would be appealing to customers. (Talanda's 12(M) Statement ¶¶ 11, 12.) Bellson reported for her first day of work within a week of being hired.[3] (KFC's 12(M) Statement ¶¶ 9, 10.)

Sometime in late September, Talanda's direct supervisor, Joanne Overly,[4] observed Bellson working at the front counter in Talanda's store. Shortly afterwards, Overly phoned Talanda to discuss Bellson's position in the restaurant. (*Id.* ¶ 10.) According to Talanda, Overly stated that she could not believe he had hired a person with missing teeth to work the front counter, and

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[2] Talanda describes a Customer Service Worker as "a person who works in the front of the store, taking and filing [sic] customers' orders as well as running the cash register." (Talanda's 12(M) Statement ¶ 8.)

[3] The parties are at odds over whether Bellson received any training prior to beginning work. Talanda claims that he performed KFC's "remote orientation" with Bellson, and properly deferred her remaining training to a later date. (Talanda's 12(M) Statement ¶ 13.) Apparently, KFC has a policy allowing employees of remotely-located restaurants to defer full training until after they have begun working. (*See id.*) KFC contends that Talanda failed to conduct the appropriate training or orientation. (KFC's 12(M) Statement ¶¶ 19, 30.)

[4] As a KFC "Market Manager," Overly was responsible for the management and supervision of numerous restaurants in her designated market. (KFC's 12(M) Statement ¶ 5.)

ordered him to move her to a food service position in the back of the restaurant. (*Id.*) Talanda questioned this order, suggesting that "people who smoke and have discolored teeth might also have this same issue." (*Id.* ¶ 11.) When Overly refused to change her stance, Talanda told her that he would "work around it." (*Id.*)

On the following day, Talanda paged Overly and then secretly taped the subsequent phone conversation. (*Id.* ¶ 2.) The transcript of that conversation reads, in pertinent part:

> TALANDA: Okay. Listen, I just wanted to talk to you. I worked with [Bellson] today, and everything seemed to be pretty good. You know, I'd like to keep her up front if that would be all right.
>
> OVERLY: No. I'm not going to—no.
>
> TALANDA: No?
>
> OVERLY: No. I don't want her up front.
>
> TALANDA: Okay. Well, I've got, you know, I've got Don in the back right now. What can I do if, if, you know. Are you telling me I have to let her go?
>
> OVERLY: I didn't say that. I said you can use her as a cook, you can use her as a prep person—
>
> TALANDA: Yeah.
>
> OVERLY: —but she is not to wait on customers.
>
> TALANDA: 'Cuz, you know, the customers were pretty friendly towards her and everything and she, you know.
>
> OVERLY: Well, what are they going to say? You have ugly teeth, you know?
>
> TALANDA: All right. So, well, you know, if she's working up front then I can get in trouble then right?

OVERLY: What do you mean you can get in trouble?

TALANDA: Well, I mean, if you come in and you see her working up front, you know, if I, you know, and then I do this then I can get in trouble; right?

OVERLY: Yeah, you can, if that's the way you want to put it.

TALANDA: Okay. Well, I don't want to go against your wishes, and if that's how you really feel about it then I won't.

OVERLY: Well, I guess you know what concerns me is that you would even consider having someone like that on your service line—

TALANDA: Well, she's—

OVERLY: —because it gives a very bad impression of your restaurant.

TALANDA: Well, she's friendly, you know.

OVERLY: And I'm sure she is—

TALANDA: She's—

OVERLY: —but that's not the issue. If QSC[5] wants smiles and she needs to smile, then I'm sorry; but that's really a turn-off to me as a customer to see that mouth. I mean, if she got her teeth fixed, that wouldn't be an issue.

TALANDA: Okay. I understand. All right. I'll work around it.

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[5] Overly's reference to "QSC" apparently refers to KFC's internal restaurant rating system. A QSC Evaluation measures a restaurant's "level of friendliness" based on the number of smiles given by the employees. (Talanda's 12(M) Statement ¶ 19.)

(Conversation Between Paul Talanda arid Joanne Overly, Ex. F to KFC's 12(M) Statement.)

The next morning, Talanda met with Bellson at the Burger King next door to the KFC restaurant and played for her the tape of his conversation with Overly. (KFC's 12(M) Statement ¶ 15.) Bellson became upset, and Talanda told her, allegedly, that he was willing to put his job on the line and "stand up for you" because he felt that what Overly had asked him to do was wrong. (*Id.* ¶ 16.) Talanda then asked Bellson if she could continue working as a customer service worker, and Bellson responded that she could.[6] (Talanda's 12(M) Statement ¶ 28.) The extent to which Talanda and Bellson discussed the possibility of a lawsuit is unclear. According to Overly, who later spoke with Bellson about the meeting, Talanda encouraged Bellson to sue KFC for discrimination. (KFC's 12(M) Statement ¶ 21.) Talanda denies that he encouraged Bellson to sue; and only admits to informing Bellson "that corporations could be fined money for taking actions like this against their employees. " (*Id.* ¶ 17; Talanda's 12(M) Statement ¶ 28.)

Despite Overly's directive to move Bellson to the back of the restaurant, Talanda kept her working at the front counter for almost three weeks. (KFC's 12(M) Statement ¶¶ 18-19.) Talanda claims that he disobeyed his supervisor's order because he thought it was "morally and legally wrong," and because "he was being asked to

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[6] Talanda also assured Bellson that she would not be discriminated against because he had no intention of moving her from the front counter. (Plaintiff's Response to Defendant's Rule 12(M) Statement of Undisputed Facts (hereinafter "Talanda's 12(N) Statement") ¶ 23.)

discriminate against Ms. Bellson because of her facial disfigurement." (Talanda's 12(M) Statement ¶ 17.) KFC notes that Talanda never specifically voiced these objections, however, and suggests that his true motives were far less noble. After learning from a supervisor at another store that Bellson was upset, Overly spoke with Bellson about what had transpired between her and Talanda. (KFC's 12(M) Statement ¶¶ 20-21.) Bellson described the tape that Talanda had played for her, and explained that Talanda "wanted [her] to sue KFC and Pepsico for discrimination." (*Id.* ¶ 21.) When Overly asked Bellson how she felt about her experiences with Talanda, Bellson indicated that she "wanted no part of Plaintiff's scheme and simply wanted him to take her off the front counter," but that Talanda refused to move her. (*Id.* ¶ 22.) Bellson also allegedly told Overly that Talanda had been harassing her about filing a lawsuit by following her around and making comments about how much money they could make. (*Id.* ¶ 23.) Finally, Overly learned from another manager in her territory that Talanda intended to "get her [Overly] fired." (*Id.* ¶ 24.)

After uncovering the full scope of Talanda's actions with respect to her directive, Overly called a meeting with John Malloy, KFC's Director of Human Resources for the North Central Division. (KFC's 12(M) Statement ¶¶ 18, 25.) At this meeting, Overly and Malloy determined that Talanda's actions were sufficiently serious to warrant termination but decided to give him a chance to explain himself. (*Id.* ¶ 25.) When Talanda arrived, he admitted to disobeying Overly's order to move Bellson, but chose not to explain his actions. (*Id.* ¶¶ 26, 29.) In fact, at no time prior to termination did Talanda inform

KFC that he believed Overly's instruction to be illegal or improper. (*Id.* ¶ 31; Talanda's 12(N) Statement ¶ 31.) After Talanda left the meeting with Overly and Malloy, he returned to his restaurant to find a security officer waiting for him. (Talanda's 12(M) Statement ¶ 32.) The officer watched him gather up his personal belongings and then escorted him from the store—warning him, in the process, not to attempt any further contact with Bellson. (*Id.* ¶ 32.)

KFC officially discharged Talanda on October 19, 1993, and he received a letter of termination a few days later. (KFC's 1.2(M) Statement ¶¶ 28, 30.) The letter enumerated the "acts of insubordination" that led to Talanda's discharge: (1) disobeying Overly's directive to remove Bellson from the front counter, (2) ignoring Bellson's wishes to be placed elsewhere in the restaurant, (3) taping his phone conversation with Overly, (4) refusing to post a MERIT work schedule for store employees, (5) not selling a particular food item, (6) not giving Bellson a new employee test or orientation session, and (7) lying to Overly about training Bellson on the register.[7] (*Id.* ¶ 30.) While the letter premised discharge on all of these insubordinate acts, Overly testi-

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[7] KFC also faults Talanda for failing to use the corporation's "open door" grievance policy to voice his concerns. (KFC's 12(M) Statement ¶ 32.) Talanda does not directly respond to this attack, but notes that by terminating him so abruptly, KFC failed to follow its own policy of progressive discipline. (Talanda's 12(M) Statement ¶ 40.) KFC argues that Talanda's "flagrant" insubordination mandates an exception to the progressive discipline policy. (Defendant KFC National Management Company's Rule 12(N) Statement in Response to Plaintiff's 12(M) Statement of Material Facts (hereinafter "KFC's 12(N) Statement") ¶ 40.)

fied that the primary reason for discharge was Talanda's failure to follow her directive. (Overly Dep., at 104-05.) Talanda rebuts many of the other allegations of insubordination. He insists that he consistently utilized the MERIT scheduling system, failed to introduce a new food item only because the requisite health permits had not yet issued, and conducted—or properly delegated—Bellson's training in accordance with KFC policy. (Talanda's 12(M) Statement ¶¶ 13, 46, 47; *see supra* note 3.)

Shortly after his termination, Talanda learned that nine KFC employees had been informed of his discharge.[8] (Talanda's 12(M) Statement ¶ 51.) He was shocked and humiliated by this information, and by the manner in which KFC discharged him for his alleged opposition to disability discrimination. (*Id.* ¶ 53.) Talanda's distress was exacerbated by his failure to find another job. Although on several occasions he felt close to receiving a job offer, Talanda claims that he was denied employment after he informed the prospective employer of the reason for his discharge from KFC. (*Id.* ¶ 52.) According to Talanda, the cumulative effect of KFC's actions took a serious toll on his health: he suffered a nervous breakdown that required hospitalization, he is undergoing therapy and receiving drugs for depression

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[8] Although Talanda insists, vigorously, that these employees were told that he was terminated "for insubordination" (Plaintiff's Combined Memorandum in Support of Its Cross Motion for Summary Judgment and in Response to Defendant's Memorandum in Support of Its Motion for Summary Judgment, at 25), the underlying evidence does not support such a claim. Talanda testified in his deposition that he could not remember if "insubordination" came up in his conversations with other KFC employees after his termination. (Talanda Dep., at 310-18.)

and anxiety, and he suffers from upset stomach, irritable bowel, diarrhea, constipation, frequent need to urinate, inability to urinate, nervous twitching of muscles, aches and pains, clenching of teeth, severe headaches, labored breathing, gas pressure, dizziness, heartburn, difficult swallowing, ear aches, hot flashes, inability to focus, sleeplessness, cold and sweaty skin, dry mouth, urge to vomit, crying, and feeling helpless. (*Id.* ¶ 53.)

On October 22, 1993, Talanda filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued to Talanda a Notification of Right to Sue on December 30, 1993. Talanda filed his federal complaint seeking both compensatory and equitable relief on March 17, 1994, within ninety days of receipt of the EEOC's notification. The complaint alleged a total of nine counts: retaliatory discharge under Illinois law and under the Americans with Disabilities Act (Counts I and V), breach of employment contract. (Count II), promissory estoppel (Counts III and IV), defamation (Count VI), false light (Count VII), tortious interference with economic expectancy (Count VIII), and intentional infliction of emotional distress (Count IX).

On August 25, 1994, pursuant to a motion by KFC, the Honorable John A. Nordberg dismissed Counts II, III, and IV for failure to state a claim on which relief can be granted. *See Talanda v. KFC Nat'l Management Co.*, 863 F. Supp. 664 (N.D. Ill. 1994). KFC filed a motion for summary judgment as to the remainder of the complaint on July 26, 1995, and Talanda filed a cross-motion for summary judgment as to Count I only on September 12. Judge Nordberg referred the motions

to this court on November 2, 1995. (*See* Referral Order of 11/2/95 by the Honorable John A. Nordberg.) Both motions for summary judgment are now fully briefed and ready for recommended decision.

DISCUSSION

Summary judgment is appropriate where the pleadings and depositions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 796 (7th Cir. 1995). "This standard is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues." *Id.* at 797. Where cross-motions for summary judgment have been submitted, the court must consider the merits of each motion and for each draw all reasonable inferences and resolve all factual uncertainties in favor of the nonmovant. *Contreras v. City of Chicago,* 920 F. Supp. 1370, 1387 (N.D. Ill. 1996). Courts proceeding under this "Janus-like perspective" will find, sometimes, that both motions must be denied. *Buttitta v. City of Chicago,* 803 F. Supp. 213, 217 (N.D. Ill. 1992), *aff'd,* 9 F.3d 1198 (7th Cir. 1993). Bearing these standards in mind, the court will consider each of the remaining counts in Talanda's complaint.

I. Retaliation Under the ADA

Count I of Talanda's complaint asserts a retaliation claim under the Americans with Disabilities Act ("ADA"). (Complaint ¶¶ 40-46.) In addition to prohib-

iting direct employment discrimination against individuals with disabilities,[9] the ADA also forbids acts of retaliation against employees who oppose those discriminatory practices:

> (a) Retaliation
>
> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 12203. Talanda alleges that KFC discharged him in retaliation for his refusal to discriminate against the facially-disfigured Bellson, thus violating § 12203 of the ADA. (Complaint ¶ 42.)

A plaintiff who asserts a claim of retaliation under the ADA has the option of proceeding under one of two burden-of-proof regimes: the "direct evidence" analysis of *Price Waterhouse v. Hopkins,* 490 U.S. 228, 246-47 (1989), or the "burden-shifting" regime enunciated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04

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[9] The "General rule" under the ADA is that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms conditions, and privileges of employment." 42 U.S.C. § 12112(a). The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [the] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

(1973).[10] To fall within the ambit of the former, an employee must offer direct evidence that retaliation was a motivating factor in the employer's adverse employment decision. *Price Waterhouse,* 490 U.S. at 250. An employee who meets this initial burden will ultimately prevail unless the employer can prove "that it would have made the same decision in the absence of the unlawful motive." *Id.* When, on the other hand, an employee's evidence of retaliatory intent is more circumstantial, the burden-shifting approach of *McDonnell Douglas* provides the appropriate framework for analysis. A plaintiff proceeding under this framework bears the initial burden of establishing a prima facie case of retaliation. Once he or she has done so, the defendant must articulate a legitimate non-discriminatory reason for its decision to discharge the plaintiff. At this point, the retaliation claim will survive only if the plaintiff can show that the articulated reason was merely a pretext for discrimination. *Dey v. Colt Constr. & Dev. Co.,* 28 F.3d 1446, 1457 (7th Cir. 1994).

In support of his motion for summary judgment and in opposition to KFC's, Talanda contends that the

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[10] While both *Price Waterhouse* and *McDonnell Douglas* involved allegations under Title VII as opposed to the ADA, and while neither involved claims of retaliatory discharge, the legal framework developed in each has since been expanded to cover the circumstances of the present action. *See Stephenson v. Aluminum Co. of America,* 915 F. Supp. 39, 52 (S.D. Ind. 1995) (discussing *Price Waterhouse* and *McDonnell Douglas* with respect to a retaliation claim under the ADA); *Larsen v. Club Corp. of America,* 855 F. Supp. 247, 252-56 (N.D. Ill. 1994) (Shadur, J.) (applying *Price Waterhouse* framework to retaliation claim).

"direct evidence" framework should apply here because he has offered direct evidence of KFC's retaliatory motive: Overly testified that KFC terminated Talanda primarily because he refused to remove Bellson from the front counter. (Plaintiff's Combined Memorandum in Support of Its Cross Motion for Summary Judgment and in Response to Defendant's Memorandum in Support of Its Motion for Summary Judgment (hereinafter "Talanda's Combined Memorandum"), at 4-8; Talanda's 12(M) Statement ¶¶ 35-36; KFC's 12(N) Statement ¶¶ 35-36; Overly Dep., at 104.) Evidence of discrimination is direct when it "can be interpreted as an acknowledgment of discriminatory intent by the defendant or its agents," *Hill v. Burrell Communications Group, Inc.*, 67 F.3d 665, 667 (7th Cir. 1995), and where it also relates to the specific employment decision in question. *Fuka v. Thomson Consumer Elecs.*, ___ F.3d ___, 1996 WL 225611, at *6 (7th Cir. May 6, 1996). While the evidence offered by Talanda is clearly related to the employment decision in question here (Talanda's discharge), it cannot be interpreted as an express acknowledgement of discriminatory intent.

Overly's testimony establishes that KFC terminated Talanda for his refusal to move Bellson, but not that it terminated him for his opposition to disability discrimination. Indeed, KFC claims that Malloy and Overly were unaware that Talanda's "refusal" had anything to do with disability discrimination, suggesting that the two superiors discharged Talanda for simple insubordination. (Defendant KFC National Management Company's Memorandum in Support of Motion for Summary Judgment (hereinafter "KFC's Memorandum"), at 11-12, 14-16.) Some of the undisputed facts in the parties'

12(M) and 12(N) statements tend to contradict KFC's alleged ignorance of the reasons behind Talanda's opposition (inferences from both the recorded and the unrecorded phone conversations between Talanda and Overly, and inferences from Overly's conversation with Bellson), but these facts provide only *inferential* evidence of KFC's intent.[11] Accordingly, the court finds that Talanda has failed to supply direct evidence of KFC's retaliatory motive and concludes, therefore, that continued analysis under the direct evidence framework is inappropriate.

The burden-shifting methodology of *McDonnell Douglas,* however, was designed to accommodate circumstantial allegations of discrimination such as those at issue here. The court will discuss the steps of the burden-shifting analysis (prima facie case; legitimate, nondiscriminatory reason; and pretext) in sequence.

A. Prima Facie Case

To establish a prima facie case of retaliation under the ADA, a plaintiff must prove that (1) he engaged in a protected activity under the ADA; (2) his employer took an adverse employment action; and (3) a causal connection exists between the protected activity and the

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[11] These facts, and the inferences to be drawn from them, are discussed in more detail below.

In his combined memorandum, Talanda lists additional "evidence that an impermissible factor motivated KFC's decision to terminate plaintiff's employment." (Talanda's Combined Memorandum, at. 6-7.) To the extent that this evidence supports a colorable motivation on the part of KFC, it also does so only by way of inference.

adverse action. *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1459 (7th Cir. 1995); *Eckles v. Consol. Rail Corp.*, 890 F. Supp. 1391, 1416 (S.D. Ind. 1995); *Howard v. Navistar Int'l Transp. Corp.*, 904 F. Supp. 922, 931 (E.D. Wis. 1995).

1. Protected Activity

KFC directs its most effective arguments against the first element—it contends that Talanda did not engage in a protected activity under the ADA. (KFC's Memorandum, at 2-12.) To begin with, KFC notes, Bellson's facial impairment did not constitute a "disability" under the ADA. (*Id.* at 3-7.) While Bellson's lack of teeth may have been unsightly, it did not impair her ability to perform any major life activities, it was only temporary,[12] Bellson herself did not consider herself to be disabled, she had no record of a disability, and KFC did not regard Bellson as being disabled. (*Id.* at 3-5.) Talanda takes issue with the last of these assertions, arguing that KFC did, indeed, regard Bellson as disabled and treat her as such. (Talanda's Combined Memorandum, at 10-15.)

Regardless of these arguments as to Bellson's status under the ADA, Talanda correctly notes that a plaintiff may engage in "protected activity" even if the challenged practice does not actually violate the ADA. *Roth,* 57 F.3d at 1459. It is sufficient, in such circumstances, if the plaintiff has a good faith and reasonable belief that he or she is challenging conduct that violates the

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[12] In fact, Bellson has now corrected her problem by wearing dentures. (KFC's Memorandum, at 4.)

statute. *Id.* Talanda has alleged facts from which a trier of fact could infer that his opposition to KFC's instruction was both reasonable and in good faith.

With regard to the reasonableness of his belief, the taped conversation between Talanda and Overly contains remarks that are not inconsistent with an intent to discriminate on the basis of facial disfigurement. While it is possible that a disability discrimination suit centered on Bellson's mangled dentition would ultimately fail, the court cannot conclude that an ADA claim resting on the facts that Talanda has alleged here would be "utterly baseless." *Holland,* 883 F.2d at 1316. *See, e.g., School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987) (recognizing that in 1974 Congress extended the coverage of the Rehabilitation Act of 1973 to "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning"; explaining that "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."); *Hodgdon v. Mt. Mansfield Co.,* 624 A.2d 1122 (Vt. 1992) (holding, with reference to *Arline*, that chambermaid discharged because she was missing front upper teeth was a handicapped individual under the state fair employment act).

With regard to good faith, Talanda has consistently asserted his belief that "Ms. Overly's directive that he move Bellson was morally and legally wrong," and that "he was being asked to discriminate against Ms. Bellson because of her facial disfigurement." (Talanda's 12(M) Statement ¶ 17.) Arid while Talanda was unfamiliar with the definition of "disability" and other important

details of the ADA (KFC's 12(M) Statement ¶ 7), he was sufficiently well-versed in KFC's general antidiscrimination policies to know that "taking action which takes away a person's job duties and pay because of a disability is discriminatory." (Talanda's 12(M) Statement ¶ 27.) Talanda's good faith is arguably further supported by his decision to file a complaint with the EEOC shortly after being terminated. *Cf. Holland*, 883 F.2d at 1315 ("The sincerity of her belief is amply supported by her assertion that she threatened to take her complaint . . . to the EEOC and did in fact subsequently contact the EEOC.").

Drawing attention to Talanda's covert tape recording operations and his failure to voice his concerns about disability discrimination explicitly, KFC argues that a finding of good faith here is inconsistent with Talanda's behavior. (KFC's Memorandum, at 8-9.) While KFC is entitled to argue that these facts create an inference of bad faith, the court is not willing to hold that they create such an inference as a matter of law. Rather, KFC has identified a genuine issue of material fact with respect to Talanda's alleged good faith. Accordingly, without actually deciding the issue of whether KFC attempted to subject Bellson to disability discrimination under the ADA, the court finds that there is enough evidence to submit to a jury the question of whether Talanda's challenge with respect to KFC's conduct was reasonable and made in good faith.[13]

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[13] The corollary to this conclusion, of course, is that Talanda has not established the absence of a dispute concerning his good faith for the purposes of his cross-motion for summary judgment.

KFC's challenges to the first element of Talanda's prima facie case do not end there, however. Defendant also contends that Talanda did not engage in "protected activity" because he never openly opposed KFC's allegedly discriminatory employment practices. (KFC's Memorandum, at 9-12.) To satisfy the first element of a retaliation claim, a plaintiff must have challenged the discriminatory conduct in such a way as to make the defendant aware of the opposition. *See Dey,* 28 F.3d at 1458 (to establish prima facie case of retaliation, employer must be aware that plaintiff engaged in protected activity); *Smith v. Enesco Imports Corp.*, No. 87 C 4975, 1989 WL 103362, at *2 (N.D. Ill. Aug. 28, 1989) (plaintiff's retaliation claim upheld where she made at least one complaint to her employer about alleged age discrimination; complaint constituted "protected activity"). Several courts in this district have held that "informal complaints to supervisors can constitute protected activity." *Laird v. Cragin Fed. Bank,* No. 92 C 8441, 1994 WL 13662, at *6 (N.D. Ill. Jan. 18, 1994), *aff'd,* 41 F.3d 1510 (7th Cir. 1994), *cert. denied,* 115 S. Ct. 2562 (1995); *see also Maldonado v. Metra,* 743 F. Supp. 563, 568 (N.D. 111. 1990).

KFC notes that while Talanda may have believed Overly's directive to be discriminatory, he neither complained of nor brought this concern to the attention of KFC's management. (KFC's Memorandum, at 9; KFC's 12(M) Statement ¶ 29.) Upon reviewing the evidence submitted by the parties, however, this court finds that there are facts from which a jury could infer that Talanda did bring his concern to the attention of KFC. During the October 28 telephone conversation between Talanda and Overly, Talanda "suggested to Ms. Overly

that circumstances such as people who smoke and have discolored teeth might also have this same issue" in response to Overly's directive to remove Bellson from the front counter. (KFC's 12(M) Statement ¶ 11.) The deposition at which Talanda testified to this conversation continued with the following question and answer:

> Q. Did you find that that was comparable, someone who might have discolored teeth, as to someone who may not have teeth at all? You felt those were comparable situations?
>
> A. I was trying to create another scenario to get more input from [Overly].

(Talanda Dep., at 214.) There is nothing to suggest that Talanda spoke the word "discrimination" during this conversation, but his comments arguably did reflect concern about discrimination. Talanda appears to have been positing other "scenarios" in order to suggest to Overly that Bellson was being treated differently than others with unsightly facial features.

During the second conversation between the two managers (which Plaintiff secretly taped), Talanda made several comments that could be viewed as attempts to oppose discrimination. The majority of this second conversation consisted of Talanda's attempts to persuade Overly to change her mind Bellson's work assignment. (*See* Conversation Between Paul Talanda and Joanne Overly, Ex. H to Talanda's 12(M) Statement.) In response to Overly's admonishments to remove Bellson from the front counter because of her "ugly teeth," Talanda stated that Bellson was very friendly and that the customers appeared satisfied with her service. (*Id.*) When Overly refused to change her mind, Talanda inquired as to the consequences were he to disobey the

directive. While, again, the word "discrimination" did not enter into the conversation, a trier of fact could interpret Talanda's call as an informal complaint to his supervisor on this subject.

Finally, a fact finder could infer KFC's awareness of Talanda's intent from the meeting between Overly and Bellson. After learning that Talanda had taped their conversation, Overly met with Bellson and asked her to explain what had transpired between her and Talanda. Bellson explained "how Plaintiff had secretly made a tape that he wanted Ms. Bellson to hear, and that he wanted Ms. Bellson to sue KFC and Pepsico for *discrimination.*" (KFC's 12(M) Statement ¶ 21 (emphasis added).) Given these undisputed facts, it is disingenuous for KFC to argue that it knew nothing of Talanda's motives for refusing to follow Overly's directive. At this point the record contains evidence from which a finder of fact could draw the inference that KFC did know that Talanda's intent related to a concern about discrimination against Bellson.

Although KFC offers a number of cases in support of its "opposition" argument, each one is distinguishable from the facts of the case at bar. Alleging discrimination on the basis of sexual orientation, plaintiff hospital director in *Howard University v. Green*, 652 A.2d 41, 66 FEP Cas. (BNA) 1252 (D.C. 1994), sued her former employer for retaliatory discharge under the District of Columbia Human Rights Act. The plaintiff obtained a jury verdict in her favor, but the appellate court ultimately concluded that the trial court should have granted defendant's motion for judgment notwithstanding the verdict. The court found that the plaintiff had failed to establish that she "engaged in a protected

activity" because, although she frequently complained of favoritism in her employer's employment practices, she never "directly complained of sexual orientation discrimination." 652 A.2d at 44. Nevertheless, the plaintiff presented circumstantial evidence of the employer's awareness: she had secretly recorded a discussion with her employer during which she referred to several rumors concerning the superior's sexual orientation. Explaining that "the plaintiff must alert the employer that she is lodging a complaint about allegedly discriminatory conduct," the court found that reliance on the rumors "require[d] too many levels of inference to establish Howard University's awareness of a discrimination complaint." *Id.* at 46-48.

In the present action, the evidence of KFC's awareness is not so attenuated. Bellson specifically told Overly that Talanda had suggested that she sue for discrimination. (KFC's 12(M) Statement ¶ 21.) It requires only one "level" of inference to deduce from this evidence that Overly recognized, at this point, that Talanda opposed her directive because he believed that it discriminated against Bellson on the basis of a perceived disability. In addition, the *Howard University* court had before it all of the evidence adduced at trial, whereas here the court is confined to the parties' pre-trial submissions. The evidence of "opposition" in *Torre v. Federated Mutual Insurance Co.*, 854 F. Supp. 790 (D. Kan. 1994), a case involving a retaliation claim under Title VII, is even weaker than what was presented in the *Howard University* case. The *Torre* plaintiff neglected the first element of her prima facie retaliation claim altogether and simply failed to provide the details of her employee complaints that would have allowed the court to deter-

mine whether she actually informed her employer of the alleged discrimination. 854 F. Supp. at 812. Thus, Torre is also distinguishable from the case at bar.[14]

When Talanda decided not to comply with Overly's directive to remove Bellson from the front counter, he arguably committed an act in opposition to discrimination that was both in good faith and reasonable. While Talanda did not specifically voice his concerns regarding disability discrimination to KFC, there is sufficient evidence for a finder of fact to infer that KFC was aware of Talanda's motive in refusing to comply with Overly's directive. For the purposes of KFC's motion for summary judgment, then, the court finds that Talanda has offered sufficient evidence to create a factual dispute concerning the first prima facie element of his retaliation claim. At the same time, Talanda has failed

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[14] *Lane v. Hughes Aircraft Co.*, 66 FEP Cas. (BNA) 1122 (Cal. Super. Ct. 1994), is distinguishable for similar reasons. One of the plaintiffs in *Lane* claimed that he was discharged for opposing an act of racial discrimination against another employee. 66 FEP Cas. (BNA) at 1127. The evidence demonstrated, however, that the plaintiff had done nothing more than offer general support when he sat in on the employee's discussion with Human Resources:

> [Plaintiff] never testified that he told the investigator that [the employee's] race discrimination claim was valid. He never told anyone in management that [the employee's] complaint had merit, or that [the employee] was discriminated against, or that Hughes needed to take remedial action. What he did tell management is that he felt [the employee's] performance was inadequate and he should not be promoted.

Id. at 1128. Talanda made no such contradictory representations to KFC management with regard to his feelings about discrimination against Bellson.

to establish KFC's awareness of his motive as a matter of law. For the purposes of his cross-motion for summary judgment, therefore, Talanda has not established the absence of factual disputes regarding this first element of the prima facie case. Accordingly, Talanda's cross-motion for summary judgment on Count I should be denied.

2. Adverse Employment Action

That Talanda suffered an adverse employment action is clearly undisputed. Talanda lost his job at KFC after fifteen years of employment there, including nine as a restaurant manager. (KFC's 12(M) Statement ¶¶ 3-4.)

3. Causal Connection

As previously discussed, KFC freely admits that it discharged Talanda at least in part, for his refusal to remove Bellson from the front counter. (KFC's 12(M) Statement ¶ 30.) The question of whether there is a causal connection between the protected activity (Talanda's opposition to disability discrimination) and the adverse employment action (Talanda's discharge) therefore rests, again, on KFC's knowledge: was KFC aware that Talanda in refusing to follow Overly's directive, sought to oppose disability discrimination? If the answer is "no," KFC can argue that it fired Talanda for insubordination alone and not for his exercise of a protected activity. But, as the court has already determined, Talanda has established the existence of a genuine issue of material fact with respect to KFC's knowledge of Talanda's motive, and thus Plaintiff has

satisfied the final prima facie element for the purposes of KFC's motion for summary judgment. At the same time, the existence of a genuine issue of material fact with regard to causation also works against Talanda providing another ground on which to deny his cross-motion for summary judgment.

The court concludes that Talanda has raised triable issues of material fact with regard to his prima facie case of retaliation. Discussion now proceeds to the second step of the burden-shifting analysis.

B. KFC's Legitimate Reasons

Talanda having established a prima facie case of retaliation, KFC must now tender a legitimate, non-discriminatory reason for the adverse employment action it took against him. In addition to simple insubordination with respect to his refusal to follow Overly's directive, KFC lists a number of reasons behind its decision to discharge Talanda: (1) he ignored Bellson's wish to be placed elsewhere in the restaurant; (2) he taped a telephone conversation with Overly without first obtaining her consent; (3) he refused to post a MERIT work schedule; (4) he was not selling a particular food item; (5) he did not give Bellson a "PDI" test or an orientation session; and (6) he lied to Overly about training Bellson at the register. (KFC's 12(M) Statement ¶ 30.)

Talanda's refusal to follow Overly's directive (purportedly KFC's primary reason for discharging Talanda (*see* Overly Dep. at 104)) and his taping of the telephone conversation without Overly's consent are the acts through which Talanda allegedly opposed KFC's disability discrimination. It is clear that the *content* of an em-

ployee protest against discrimination cannot be a legitimate, non-discriminatory reason for discharge. *Jennings v. Tinley Park Community Consol. Sch. Dist. No. 146*, 864 F.2d 1368, 1374 (7th Cir. 1988). As KFC points out, however, protection against adverse consequences from opposing an unlawful employment practice is not absolute. (KFC's Memorandum, at 13-14.) If a plaintiff opposes discrimination in an unreasonable manner, or if the opposition "so interferes with the performance of his job that it renders him ineffective in the position for which he was employed," the plaintiff's activity is not protected. *Rosser v. Laborers' Int'l Union of North Am., Local No. 438*, 616 F.2d 221, 223 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980); *see also Jennings*, 864 F.2d at 1374. The same is true if an employee's opposition activities adversely affect the work of others: "when an employee engaged in opposition to a perceived unlawful employment practice participates in conduct which does not further the protest, but rather merely hinders another person's ability to perform his job, that employee relinquishes statutory protection." *Jennings*, 864 F.2d at 1375.

Talanda has raised a genuine issue of material fact over whether his refusal to follow Overly's directive, when separated from its protected message, was a legitimate reason for termination. First, Talanda asserts that he received favorable performance reviews throughout the course of his employment with KFC, up to and including a review six weeks prior to his termination. (Talanda's 12(M) Statement ¶¶ 3-4.) Second, he points out that KFC typically follows a progressive discipline policy with regard to acts of insubordination by its employees. (Talanda's 12(M) Statement ¶ 40.) Indeed,

Talanda presents some evidence, albeit disputed by KFC, that Overly punished other employees at Talanda's store less severely for their acts of insubordination. (*See* Talanda's 12(M) Statement ¶¶ 44-45; KFC's 12(N) Statement ¶¶ 44-45.) Given the possibility that Talanda's infraction could have been reproved with an appropriate reprimand or transfer, the court concludes that genuine disputes of fact preclude its use as a legitimate, non-discriminatory reason for discharge.

KFC also contends, however, that Talanda's opposition went beyond the bounds of reasonableness when he secretly recorded a conversation with his supervisor and then played that recording for Bellson. (KFC's Memorandum, at 13-14.) Talanda's surreptitious recording of his conversation with Overly raises difficult issues. Certainly such conduct would be disturbing to a supervisor. In arguing that the recording was unreasonable opposition as a matter of law, however, KFC must demonstrate that Talanda's conduct rendered him ineffective as a KFC manager or hindered the job performance of other KFC employees. There is no undisputed evidence that would require either of these conclusions. First, Talanda apparently continued to manage his store in a reasonable manner after he recorded the conversation with Overly (albeit before she learned of the recording). And while she was undoubtedly affronted by the tape recording, Overly herself testified that her primary reason for discharging Talanda was his failure to follow orders, not the recording. (*See* Overly Dep., at 104-05.)

Nor can the court conclude, as a matter of law, that Talanda's recording activities hindered the performance of other employees. In *Jennings*, the secretary for a school district superintendent brought suit against her

employer for sex discrimination and retaliatory discharge. 864 F.2d at 1369-71. In the course of opposing what she felt were discriminatory salary differences between secretaries and custodians, the plaintiff deliberately withheld an alternate salary study from her superior so that he would be unprepared to respond to it at a school board meeting. *Id.* at 1370. Affirming the decision of the district court, the Seventh Circuit found that the plaintiff had exceeded the cloak of statutory protection by gratuitously hindering her supervisor's ability to perform his job, and that the supervisor's decision to fire her was therefore legitimate and non-discriminatory. *Id.* at 1374-75. In the present action, by contrast, there is no undisputed evidence that Talanda gratuitously used the surreptitious recording to hinder Overly's job. Nothing offered by Defendant suggests that Talanda threatened Overly—or any other KFC employee, for that matter—with revelation of the tape. Talanda admits revealing the tape to Bellson, but only to let her know, allegedly, that "he would not discriminate against [her]." (Talanda's 12(M) Statement ¶ 28.) Indeed, it is at least arguable that Talanda chose to record the conversation in order to further substantiate his protest against KFC's discriminatory practices.

The cases that KFC cites in support of its argument do not alter this court's conclusion regarding the recording; each involved opposition activities a great deal more disruptive than those involved in the present action. *See Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) (opposition unreasonable where employee circulated rumors about her employer's loss of federal funding, allowed a reporter to view confidential salary files, and constantly complained

to her colleagues in such a manner that she damaged working relationships and interfered with laboratory research); *Women Employed v. Rinella & Rinella*, 468 F. Supp. 1123 (N.D. Ill. 1979) (opposition unreasonable where plaintiffs engaged in program of harassment that included, among other activities, passing out leaflets, mobbing defendant's place of business, exhibiting stuffed effigy of defendant, and sending derogatory letters about the defendant to clients).

The court does not seek to minimize the serious loss of trust that may result from recording a conversation with one's supervisor without her consent. A jury may well conclude that it was this loss of trust, rather than any reaction to Plaintiff's concerns about Bellson, that motivated Plaintiff's discharge. KFC has not, however, offered evidence that establishes that KFC views tape recording any conversation with a supervisor as grounds for immediate discharge, and this court is unwilling to reach such a conclusion as a matter of law. Moreover, unlike the plaintiff in *Jennings,* the court cannot say that Talanda used his opposition activities "as a gratuitous opportunity to embarrass a supervisor or thwart [the supervisor's] ability to perform his job." *Id.* at 1375. In view of the fact that Talanda's refusal to follow Overly's directive and his taping activities were themselves the vehicles for this alleged opposition to discrimination, the court concludes that KFC has not established as a matter of law, that this conduct was a legitimate, non-discriminatory reason for discharge. *Cf. Stephenson v. Aluminum Co. of Am.*, 915 F. Supp. 39, 54 (S.D. Ind. 1996) (holding that "Plaintiff's 'lack of cooperation' in dealing with her complaints of discrimination" could not be legitimate, non-discriminatory grounds for her transfer).

The remainder of KFC's proffered reasons for discharge (his failure to post a MERIT schedule, sell a particular food item, and properly train Bellson) could, however, serve as legitimate and non-discriminatory grounds for an adverse employment action against Talanda. To survive summary judgment, then, Talanda must offer some evidence that these reasons are merely a pretext for discrimination.

C. Pretext

While KFC offers a number of legitimate and non-discriminatory reasons for its termination decision, Talanda specifically refutes the facts that support these reasons. "Although general averments of adequate performance are. insufficient to create a factual issue on summary judgment even when corroborated by statements of supervisors or coworkers, a plaintiff may create an issue of fact by specifically refuting facts that allegedly support the employer's claim of performance deficiencies." *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1460 (7th Cir. 1994). Talanda claims that he regularly used the MERIT scheduling system, and was never disciplined for an alleged failure to do so. (Talanda's 12(M) Statement ¶¶ 41, 46.) As for KFC's claim that he failed to sell a particular food item, Talanda insists that he could not introduce the item at issue (a barbecue sandwich) because his store was still in the process of obtaining the necessary county and state health permits. (*Id.* ¶ 47.)

Talanda also contends that he performed a "remote orientation" with Bellson, and delegated her remaining training to a district office in accordance with KFC

procedures. (*Id.* ¶ 13.) Finally, the fact that Talanda refused to position Bellson according to her wishes cannot, in and of itself, be a legitimate basis for termination. As manager of his store, Talanda certainly had the discretion to override employee preferences when staffing restrictions so required. (*See id.* ¶ 18.) By specifically refuting each of the termination reasons offered by KFC,[15] Talanda has created a genuine issue of material fact as to whether those reasons are merely a pretext for discrimination. Again, Talanda's cross-motion for summary judgment also fails because of this genuine issue of material fact—Talanda could not establish pretext as a matter of law.

Because genuine issues of material fact preclude a grant of summary judgment on Talanda's ADA claim, KFC's motion should be denied with respect to Count I of his complaint. Talanda's cross-motion for summary judgment should be denied for the same reason.

II. Retaliatory Discharge Under Illinois Law

To establish a claim of retaliatory discharge under Illinois law, a plaintiff must prove that he or she was (1) discharged, (2) in retaliation for his or her activities,

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[15] KFC insists that Talanda cannot rely on these refutations to establish pretext because he never offered these explanations to KFC prior to his termination, even when specifically asked to explain himself. (KFC's Memorandum, at 16.) The court can find no merit to this argument. KFC provides the court with no case law to support this contention, and does not explain why a retaliation plaintiff should be required to inform his or her employer of the pretextual nature of the employer's own employment decision.

and (3) that the discharge violates a clear mandate of public policy. *Long v. Commercial Carriers Inc.*, 57 F.3d 592, 594 (7th Cir. 1995). KFC contends that it is entitled to judgment on Talanda's common law retaliatory discharge claim (Count V) for the same reasons asserted against his ADA retaliation claim. (KFC's Memorandum, at 2 n.3.) The court has found, however, that genuine issues of material fact preclude a grant of judgment on Talanda's federal retaliation claim. *See* supra part 1. Moreover, KFC does not argue that discharge for opposition to disability discrimination does not violate a clear mandate of Illinois public policy, and this court would be reluctant to so find. *See* Illinois Human Rights Act, 775 ILCS 5/1-102, 5/1-103, 5/2-102, 5/6-101 (sections relating to employment discrimination, handicap discrimination, and retaliatory discharge).

Nevertheless, the court finds, *sua sponte,* that it has no jurisdiction over Talanda's state law retaliation claim. The Illinois Human Rights Act ("IHRA") specifically provides redress for retaliatory discharge on the basis of disability. *See id.* A claim under the IHRA is a plaintiff's exclusive remedy for an alleged civil rights violation: "Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." 775 ILCS 5/8-111(C). Given that an Illinois state court would not have jurisdiction to hear Talanda's retaliatory discharge claim, this court, bound as it is to apply Illinois law to Talanda's supplemental claims, is also without jurisdiction. *See Johnson v. Baxter Healthcare Corp.*, 907 F. Supp. 271 (N.D. Ill. 1995); *Geise v. Phoenix Co.*, 159 Ill. 2d 507, 639 N.E.2d 1273 (1994). Accordingly, KFC's motion for summary judgment

should be granted with respect to Count V of Talanda's complaint.

III. Defamation

KFC argues next that Talanda has presented insufficient proof to support his defamation claim (Count VI). (KFC's Memorandum, at 16-17.) To establish a claim of defamation under Illinois law, a plaintiff must demonstrate with sufficient factual allegations that (1) the defendant made a false statement concerning the plaintiff, (2) there was an unprivileged publication to a third party with fault by the defendant, and (3) the publication caused damage to the plaintiff. *In re Salem Mills, Inc.*, 881 F. Supp. 1109, 1118-19 (N.D. Ill. 1995); *Pandya v. Hoerchler*, 256 Ill. App. 3d 669, 673, 628 N.E.2d 1040, 1043 (1st Dist. 1993). Talanda alleges that KFC made a false statement about his discharge (that he was discharged for insubordination rather than for opposing disability discrimination), which was then published to other KFC employees. (Complaint ¶¶ 77-87.)

An allegedly defamatory statement may be either defamatory *per se* or defamatory *per quod*. A statement is considered defamatory *per se*, and thus presumptively injurious, when its defamatory nature is facially apparent. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 10, 607 N.E.2d 201, 206 (1992). Illinois courts recognize four categories of statements that are considered defamatory *per se:*

> (1) words which impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the

> discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession, or business.

Id. at 10-11, 607 N.E.2d at 206. KFC's charge of insubordination falls into categories (3) and (4), and may thus be considered defamatory *per se*. *See Calder v. Planned Community Living, Inc.*, No. 93 Civ. 8882, 1995 WL 456400, at *10 (S.D.N.Y. Aug. 2, 1995) (accusation of gross insubordination actionable as *per se* defamation).

KFC may be liable for defamation, then, if it made a false statement concerning Talanda and then published that statement to a third party. With regard to the falsity of KFC's statement, Talanda has alleged sufficient facts to create a genuine issue for trial. Both in the termination letter that KFC sent to Talanda and in his unemployment hearing, KFC stated that Talanda was terminated for insubordination. (KFC's 12(M) Statement ¶ 30; Talanda's 12(M) Statement ¶ 35.) Whether this statement is false, and Talanda was instead terminated for his opposition to disability discrimination, is the question at issue in Talanda's ADA claim. Genuine issues of material fact preclude a grant of judgment on Talanda's ADA claim, however, and thus Talanda has adequately raised a factual dispute concerning the falsity of KFC's statement for the purposes of the present motion for summary judgment.[16]

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[16] The court notes that KFC has not asserted a qualified privilege to Talanda's accusations of defamation. Had it done so, Talanda would bear the additional burden of proving that the allegedly defamatory statement was made with malice. *Krasinski v. United Parcel Serv.*, 124 Ill. 2d 483, 490, 530 N.E.2d 468, 471 (1988) ("If the defamation claim arises out of

(continued...)

Talanda does not fare as well with regard to the issue of publication. To prove publication a plaintiff must show that "the defamatory statements were communicated to some person other than the plaintiff." *In re Salem Mills, Inc.*, 881 F. Supp. 1109, 1119 (N.D. Ill. 1995) (quoting *Pandya*, 256 Ill. App. 3d at 673, 628 N.E.2d at 1043). A plaintiff can satisfy the publication requirement with evidence that the employer communicated to other employees that the plaintiff was dismissed for reasons related to integrity. *Id.* Talanda alleges that KFC communicated both the fact of and the spurious reasons behind his termination to other KFC employees. He supports this allegation with his own deposition testimony, wherein he identified only two KFC employees with whom he remembered speaking: Mike Maile and Mike Akkala.[17] (Talanda's 12(M) Statement ¶ 51.) He testified as follows with respect to Mike Maile:

> A: Well, there's a guy named Mike Maile who used to work for the company. And he had heard that I was terminated at first by Russ Biggerstaff.
>
> . . .
>
> . . . .
>
> Q: What did he tell you Russ told him?

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[16] (...continued)
an employer-employee relationship, the plaintiff may be confronted with a qualified privilege. To overcome the privilege, the plaintiff has to plead and prove that the statements were made with actual malice.")

[17] In his affidavit, Talanda identifies nine employees who were told of his termination. (Talanda Aff. ¶ 36.) As KFC points out, this submission serves only to establish that nine employees were informed of Talanda's termination, not that they were informed of *the reason* behind the termination.

A: Just that I had been terminated.

. . . .

Q: Do you recall Mr. Maile saying anything else to you about what Russ Biggerstaff told him?

A: I can't remember if insubordination came up.

(Talanda Dep. at 311-12.) In response to a question about his conversation with Mike Akkala, Talanda testified that "[Akkala] told me that an employee named John in the Lake Zurich store had told him—told him that there was—that he heard Paul Talanda, that I was terminated from KFC. I'm not sure if he said insubordination." (*Id.* at 313.)

Talanda's testimony concerning statements allegedly made to other KFC employees is obviously hearsay. Even if that testimony were admissible, it would establish, at most, that a number of employees were told that he was terminated. There is no evidence that these employees were told *the reason* for his termination. It is the label of "insubordination" that Talanda urges is false; Talanda cannot dispute that he was, indeed, terminated. And yet, talk of "insubordination" is conspicuously missing from Talanda's memories of conversations with the allegedly informed employees. Talanda did testify that some employees were aware of his covert tape recording—a fact which, because of its truth, could not be defamatory if communicated. (Talanda Dep. at 310, 312.) Some employees may have surmised from this knowledge that Talanda was fired for insubordination,[18]

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[18] Employees at Talanda's store may have drawn a similar inference from the presence of a security guard on Talanda's

(continued...)

or may have started rumors to that effect. Rumors bearing derogatory messages, however, are not defamatory unless instigated by the defendant. *See Scherer v. Rockwell Int'l Corp.*, 766 F. Supp. 593, 607 (N.D. Ill. 1991), *aff'd*, 975 F.2d 356 (7th Cir. 1992). Viewing the evidence in the light most favorable to Talanda no reasonable trier of fact could conclude that KFC published the reason for Talanda's discharge to any KFC employees. Thus, KFC is entitled to a grant of summary judgment on Count VI of Talanda's complaint.[19]

IV. False Light

In Count VII of his complaint, Talanda alleges that KFC's communication of "insubordination" as the reason for his discharge unreasonably placed him in a false light before the public. (Complaint 188.) To establish an invasion of privacy claim for publicly placing another in a false light, a plaintiff must show that (1) he or she

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[18] (...continued)
last day. Because it is susceptible to an innocent interpretation, however, a security guard escort cannot, by itself, sustain a claim of defamation *per se*. *Davis v. John Crane, Inc.*, 261 Ill. App. 3d 419, 432, 633 N.E.2d 929, 938 (1st Dist. 1994); *Dubrovin v. Marshall Field's & Co. Employee's Credit Union*, 180 Ill. App. 3d 992, 996-98, 536 N.E.2d 800, 803 (1st Dist.), *appeal denied*, 127 Ill. 2d 614, 545 N.E.2d 108 (1989).

[19] Talanda's complaint also contains an allegation of self-defamation: when asked by prospective employers, Talanda stated that he had been discharged for insubordination, thus defaming himself. (Complaint ¶ 79; Talanda's 12(M) Statement ¶ 51.) As KFC correctly notes, the tort of self-defamation is not recognized in Illinois. *See Rice v. Nova Biomedical* Corp., 38 F.3d 909, 911-12 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1964 (1995).

was placed in a false light before the public as a result of the defendant's actions, (2) the false light in which the plaintiff was placed would be highly offensive to a reasonable person, and (3) the defendant acted with actual malice. *Thomas v. Pearl,* 998 F.2d 447, 452 (7th Cir. 1993), *cert. denied,* 114 S. Ct. 688 (1994); *Kolegas,* 154 Ill. 2d at 17-18, 607 N.E.2d at 209-10. Talanda's false light claim flounders on element (1) for the same reason that his defamation claim was unsuccessful: insufficient evidence of publication.

In describing the tort of false light, the Illinois Supreme Court has stated that "the heart of this tort lies in the publicity." *Lovgren v. Citizens First Nat'l Bank of Princeton,* 126 Ill. 2d 411, 418-19, 534 N.E.2d 987, 989 (1989). As one court in this district has explained this comment, the tort of false light serves to

> protect people who have been injured by damaging false information spread in the media, or to a whole community. In that situation, too many people have perceived the plaintiff in the false light for him to explain or refute the unfair characterization, leaving the plaintiff in an unfair position.

Matrix Essentials, Inc. v. Karol, No. 89 C 9611, 1992 WL 166926, at *2 (N.D. Ill. July 8, 1992). For a false characterization to be actionable, then, the defendant must have made the characterization public "by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Kelly v. Mercoid Corp.,* 776 F. Supp. 1246, 1257 (N.D. Ill. 1991) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977)); *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 742 F. Supp. 1359, 1372 (N.D. Ill. 1990).

In *Matrix*, a counter-claimant in a trademark and unfair competition suit alleged that it had been placed in a false light when the plaintiff's investigator suggested to customers that it had stolen goods from the plaintiff's warehouse. 1992 WL 166926, at *1. The court granted the plaintiff's motion for summary judgment as to the defendant's false light counterclaim after finding insufficient evidence of publication:

> The only evidence to support [defendant's] false light claim are the statements of two customers about hearing [theft] remarks in connection with [defendant's] name. Even if the Court adopts [defendant's] argument and assumes that the other customers heard the same remarks . . . [plaintiff] would be entitled to summary judgment on this claim. Comments by an investigator to a store manager or owner, even among forty of [defendant's] customers, would not meet the publicity test set by the Restatement and adopted by *Lovgren*.

Id. at *2-*3. In the case at bar, Talanda could name only nine people who had heard of his termination. (Talanda's 12(M) Statement ¶ 51.) Even assuming that a number of other individuals learned of Talanda's termination when he was escorted from the restaurant by a security officer, no reasonable trier of fact could find that the reason for his discharge was communicated to the "public at large." Indeed, it is likely that Talanda could have explained or refuted the unfair characterization to the relatively small number of people who viewed Talanda in a false light. Thus, KFC's motion for summary judgment should be granted with respect to Count VII of Talanda's complaint.

V. Tortious Interference with an Economic Expectancy

Talanda claims in Count VIII that KFC tortiously interfered with his economic expectancies because he had trouble finding a job after KFC discharged him. (Complaint ¶¶ 93-104.) KFC argues that Talanda has failed to establish the elements of this cause of action. (KFC's Memorandum at 20.) To Succeed on a claim of interference with economic expectancy, an Illinois plaintiff must show that (1) he or she has a reasonable expectancy of a valid business relationship; (2) the defendant knows about it; (3) the defendant intentionally interfered with the expectancy, preventing it from ripening into a valid business relationship; and (4) the plaintiff suffered injury. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d 991, 994, 639 N.E.2d 144, 147 (1st Dist. 1993); *Manion v. Stallings & Co., Inc.*, 204 Ill. App. 3d 179, 188, 561 N.E.2d 1134, 1139 (1st Dist. 1990). A plaintiff must establish a business expectancy with a specific third party, and must also establish action by the defendant directed towards the party with whom the plaintiff expects to do business. *Schuler*, 265 Ill. App. 3d at 994-95, 639 N.E.2d at 147.

Talanda merely alleges here that he "felt that he was going to receive job offers, only to be denied employment after the prospective employer learned [through Talanda] of the reason for his discharge from KFC." (Talanda's 12(M) ¶ 52.) Notably, Talanda has not specifically identified any third parties with whom he expected to do business, and he certainly has not offered evidence of KFC's knowledge of or communication with any of his prospective employers. Nor has he offered any case law that would otherwise support his claim for interference with an economic expectancy. KFC is thus entitled to

judgment as a matter of law on Count VIII of Talanda's complaint, and the court accordingly recommends that KFC's motion for summary judgment be granted in this respect.

VI. Intentional Infliction of Emotional Distress

Talanda asserts a claim for intentional infliction of emotional distress in Count IX of his complaint. (Complaint ¶¶ 105-07.) To prevail on such a claim under Illinois law, a plaintiff must plead and prove that (1) the offending conduct was extreme and outrageous, (2) the actor intended or knew that the conduct would inflict severe emotional distress, and (3) the conduct did in fact cause such distress. *Lopacich v. Falk,* 5 F.3d 210, 212 (7th Cir. 1993) (citing *McGrath v. Fahey,* 126 Ill. 2d 78, 86, 533 N.E.2d 806, 809 (1988)). Talanda's intentional infliction of emotional distress claim rests on the following incidents. KFC fired Talanda an employee of fifteen years, after he refused to comply with a directive to commit disability discrimination. (Talanda's Combined Memorandum, at 30.) KFC discharged Talanda in such a way that several other KFC employees became aware of the reasons for his termination. (*Id.*; Talanda's 12(M) Statement ¶ 51.) Finally, on the day of his termination Talanda was escorted from his restaurant by a security guard. (Talanda's 12(M) Statement ¶ 32.)

KFC contends that these actions, even if true, do not amount to the kind of extreme and outrageous conduct necessary to satisfy the first element of the intentional infliction of emotional distress cause of action. (KFC's Memorandum, at 19.) This court agrees. Conduct is deemed "extreme and outrageous" only if it is so ex-

treme in degree and so outrageous in nature that it exceeds all bounds of human decency and is intolerable in a civilized society. *Piech v. Arthur Andersen & Co., S.C.*, 841 F. Supp. 825, 831 (N.D. Ill. 1994). In the employment context, where personality conflicts and job-related stress are unavoidable, the conduct complained of must be particularly outrageous. *Id.* Indeed, a discrimination claim, by itself, will usually not support a claim for intentional infliction of emotional distress. *Miles v. LaSalle Fin. Servs., Inc.*, No. 93 C 1660, 1995 WL 599053, at *5 (N.D. Ill. Oct. 5, 1995).

The plaintiff in *Miles* filed a discrimination suit against his employer that included a claim for intentional infliction of emotional distress. *Id.* at *1. In support of his claim, the plaintiff alleged that

> defendants engaged in an ongoing discriminatory policy, that he relied on the false representation that he was reviewed on his "applied diligence," that false statements regarding his job performance found in memos and performance reviews were published to other [ ] managers and the Human Resource Department, and that he was fired for his opposition to the ongoing discriminatory policy.

Id. at *5. The court found that these allegations did not rise to the level of outrageous conduct required to establish a claim for intentional infliction of emotional distress, and accordingly granted the defendants' motion to dismiss. *Id.* at *8. The conduct that Talanda complains of here is no more "outrageous" than that alleged by the plaintiff in *Miles*. While KFC's actions in discharging Talanda for "Insubordination," revealing the circumstances of his discharge to other employees, and sending a security officer to escort him out undoubtedly

caused Talanda distress,[20] these actions simply do not rise to the level of outrageous conduct in the eyes of Illinois courts. *See, e.g., Miller v. Equitable Life Assurance Soc.*, 181 Ill. App. 3d 954, 537 N.E.2d 887 (1st Dist. 1989) (no action for intentional infliction of emotional distress where supervisors ignored or criticized plaintiff's requests for job training and assistance; her job performance was ridiculed; she was called a "white racist" by co-workers and threatened with physical harm; she was threatened with termination if she did not produce new business; her supervisors refused to let her get police assistance when a co-worker hit her and threw coffee at her; a co-worker touched her breast and stated that he "wanted" her; her manager frequently encouraged her to use sex to make sales; and she was ultimately fired for reporting insurance fraud). The court finds, as a matter of law, that the incidents of which Talanda complains do not satisfy the "extreme and outrageous" element of his claim for intentional infliction of emotional distress. Thus, KFC's motion for

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[20] Talanda lists a number of physical and mental manifestations of his emotional distress, including hospitalization for a nervous breakdown, upset stomach, diarrhea, nervous twitching, and loss of sleep. (Talanda's 12(M) Statement ¶ 53.) In addition, Talanda has undergone treatment by a psychiatrist and is currently taking anti-depressant drugs. (*Id.*) These facts, along with the cases cited by Talanda, *see Bristow v. Drake Street Inc.*, 41 F.3d 345 (7th Cir. 1994); *Pavilon v. Kaferly*, 204 Ill. App. 3d 235, 561 N.E.2d 1245 (1st Dist. 1990), lend support to the third element of Talanda's intentional infliction of emotional distress claim because they tend to establish that Talanda did, indeed, suffer severe emotional distress. The court does not reach the third element here—Talanda's claim falls on element (1). The court notes, however, that this evidence may support Talanda's claim for compensatory damages if he prevails under the ADA.

summary judgment should be granted with respect to the final count in Talanda's complaint.[21]

CONCLUSION

For the foregoing reasons, KFC's motion for summary judgment should be denied with respect to Talanda's ADA claim (Count 1) and granted with respect to the remaining accounts in the complaint. Talanda's cross-motion for summary judgment should be denied.

ENTER:

/s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States Magistrate Judge

Dated: May 31, 1996

Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable John A. Nordberg. *See* FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Lorentzen v. Anderson Pest Control,* 64 F.3d 327, 330 (7th Cir. 1995).

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[21] The court notes that Talanda's intentional infliction of emotional distress claim may be preempted by the Illinois Human Rights Act because it is, to some extent, intertwined with his retaliatory discharge claim. *See Geise v. Phoenix Co. of Chicago*, 159 Ill. 2d 507, 515-18, 639 N.E.2d 1273, 1276-78 (1994) (preemption recognized in sexual harassment context). Given that the outcome would be the same, however, the court recommends that judgment be granted to KFC on the basis of Talanda's failure to establish the elements of this cause of action.

[Dated March 31, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAUL TALANDA, Plaintiff,	)	
v.	)	No. 94 C 1668
KFC NATIONAL MANAGEMENT COMPANY, a Delaware corporation d/b/a KFC a/k/a Kentucky Fried Chicken, a Delaware corporation and a subsidiary of PEPSICO, Inc., a North Carolina corporation,	)	Judge John A. Nordberg
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Paul Talanda ("Talanda") has sued his former employer, KFC National Management Company ("KFC"), alleging various causes of action pursuant to KFC's termination of his employment. In addition to common law and state statutory causes of action, Talanda alleges a cause of action under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, alleging KFC terminated his employment in retaliation for his opposition to KFC's discriminatory acts against Dee Bellson ("Bellson") on the basis of disability. The Court referred cross-motions for summary judgment to Magistrate Judge Pallmeyer for a Report and Recommendation ("R&R").

Before the Court is the R&R, recommending the Court deny Defendant's motion as to the ADA count, grant De-

fendant's motion as to the remaining counts, and deny Plaintiff's motion in its entirety. Both parties filed objections to the R&R; both parties also filed responses to their counterpart's objections. In light of the objections, the Court reviews the Magistrate Judge's determinations on a de novo basis. Fed. R. Civ. P. 72(b). However, the Court's review is not limited to those Objections. For the following reasons, the Court accepts the Magistrate Judge's recommendation to deny Plaintiff's motion, but respectfully does not accept the Magistrate Judge's recommendation as to Defendant's motion and, instead, grants summary judgment to Defendant on the ADA count and dismisses the remaining counts without prejudice.

I. BACKGROUND

Because neither Defendant nor Plaintiff objects to the Magistrate Judge's excellent description of the facts, the Court accepts and adopts them by reference to the attached R&R. *Thomas v. Arn*, 474 U.S. 140, 149-50, 106 S. Ct. 466, 472 (1985); *Hunger v. Leininger*, 15 F.3d 664, 668 (7th Cir. 1994).

II. Count I: Retaliatory Discharge in Violation of A.D.A.

As Magistrate Judge Pallmeyer fully develops, a person taking action in opposition to employment discrimination is protected from retaliation from his employer, but that protection is not absolute. Of particular relevance in this case, the protection is limited by reasonableness. First, protection is only available where the person has a reasonable belief that he is opposing dis-

crimination.[1] *Roth v. Lutheran General Hospital,* 57 F.3d 1446, 1459 (7th Cir. 1995); *Dey v. Colt Const. & Development Co.,* 28 F.3d 1446, 1458 (7th Cir. 1994) ("It is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case.") Second, only reasonable means of opposing discrimination are protected. *Jennings v. Tinley Park Community Consolidated School Dist. No. 146,* 864 F.2d 1368, 1372 (7th Cir. 1988); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-06 (1973). After carefully evaluating the evidence and arguments presented by the parties, the Court finds that Talanda's alleged opposition activities were not reasonable in either of these respects.

A. Bellson Was Not a Person with a Disability

The Americans with Disabilities Act ("ADA") prohibits discrimination against a "qualified individual with a disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 28 U.S.C. § 12112(a). "Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment or; (C) being regarded as having such an impairment." 28 U.S.C. § 12102(2).

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[1] Also, the belief must be sincere. *Roth v. Lutheran General Hospital,* 57 F.3d 1446, 1459 (7th Cir. 1995). The Court fully agrees with the R&R's findings regarding this issue and its conclusion that there is a genuine issue with respect to the sincerity of Plaintiff's belief.

As a reasonable jury could not find that Bellson's missing teeth substantially limited any of her major life activities, Bellson did not suffer from an impairment constituting a "disability". The only major life function Bellson's injury may have limited is working at certain jobs. However, Talanda presents no evidence to suggest Bellson was limited in any general capacity, much less substantially limited. On the contrary, Bellson states that her missing teeth did not "prohibit" her from working. Bellson Aff. at ¶ 24. Illustrating this fact, she successfully found work with Defendant and found work with another fast-food restaurant after leaving the employ of Defendant. Furthermore, even if Bellson's injury impeded her from working, temporary injuries such as hers generally are not considered disabilities under the ADA, particularly when those injuries, like Bellson's, are readily correctable. *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996); *Sanders v. Arneson Products, Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996); *see also* 29 C.F.R. § 1630.20(j) ("temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.) As examples of injuries not amounting to disabilities, the ADA regulations list broken limbs, sprains, concussions, and infections. 29 C.F.R. § 1630 (Appendix). In terms of limiting major life activities, the Court finds Bellson's injury no different from those listed in the regulation. Even if the missing teeth did limit her to any extent, the limitation was of limited duration, lasting only until she could afford to have them fixed. Therefore, any limitation posed by her miss-

ing teeth clearly was not substantial.[2]

However, Talanda argues that while Bellson was not actually disabled, Bellson was "regarded" as being disabled. Talanda bases his argument solely on Overly's remarks regarding Bellson's smile and her order to move Bellson off the service line. In these remarks, Overly only suggested Bellson was unsuited for a single job, a smiling order-taker. As the Seventh Circuit has ruled, "It is now well-established that 'an inability to perform a particular job for a particular employer' is not sufficient to establish a substantial limitation on the ability to work; rather, 'the impairment must substantially limit employment generally.'" *Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959, 961 (7th Cir. 1996) (quoting *Byrne v. Board of Educ.*, 979 F.2d 560, 567 (7th Cir. 1992)); 29 C.F.R. § 1630.20(j)(3)(1) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.") This rule applies equally where the plaintiff argues one is "regarded" as having a disability. *Byrne*, 979 F.2d at 567; *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1449 (W.D. Wisc. 1996). As Overly suggested moving Bellson to another position in the restaurant, she clearly did not regard Bellson as unqualified to work generally, but only as to the one position in which she was presently working. Hence, no

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[2] Perhaps recognizing the futility of the argument, Talanda does not argue that Bellson had an actual disability under § 12102(2)(A). The Magistrate, however, found Talanda's belief was reasonable based on her actually having an injury. Accordingly, the Court addresses this issue even though Plaintiff did not argue it.

one regarded Bellson as having an impairment constituting a disability.

Accordingly, the uncontested facts establish that Bellson was not disabled under the ADA. Talanda may have believed he was acting in opposition to discrimination against Bellson based on her "disability", but in fact he was not. KFC could not have been unlawfully discriminating against Bellson because Bellson was not protected by the ADA.

B. Overly's Order Was Not an Adverse Employment Action

Furthermore, Overly's order, had Talanda obeyed it, would not have been a materially adverse employment action with respect to Bellson if it was adverse at all. Therefore, the act Talanda opposed was not illegal under the ADA.

Although none of the various civil rights acts explicitly require that the adverse employment action be material, the courts have found an implicit materiality requirement so as to avoid swamping the courts and the E.E.O.C. with matters involving trivial slights, real and imagined. *U.S. v. Acosta*, 85 F.3d 270, 274 (7th Cir. 1995) ("Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.")); *Johnson v. City of Fort Wayne, Indiana*, 91 F.3d 922, 932 (7th Cir. 1996) (applying Title VII); *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (applying the Age Discrimination in Employment Act). Given the less clearly-defined class of potential plaintiffs, uncertainty about what constitutes a "reason-

able accommodation", and other vagaries of the ADA, the rationale cited for the materiality requirement in Title VII and the Age Discrimination in Employment Act ("ADEA") applies at least as well to the ADA. Therefore, the Court finds that an employment action must be materially adverse in order to amount to a violation of the ADA.[3]

Overly's order to move Bellson off the front-counter to a food preparation position, the order which Talanda clandestinely refused to carry out, would not have been a materially adverse employment action. The Seventh Circuit has found,

> "[A] material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."

Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993) (applying the Age Discrimination in Employment Act). Overly's proposed move involved no change in wage, title or benefits. As Talanda concedes,

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[3] In *Whitchurch v. Apache Products Co.*, 916 F. Supp. 809, 816 (N.D. Ill. 1996), the court imposed the materiality requirement in an ADA claim. However, that court merely imported the materiality requirement in the process of importing the *McDonnell-Douglas* framework from Title VII. Thus, the court did not specifically address the appropriateness of the requirement in the ADA.

the food preparation position was not an inferior position to the counter position; in fact, Talanda states that "employees are supposed to work at all positions." Talanda Employment Hearing Trans. at 13. Bellson also did not regard the position as inferior to her incumbent position; she states in her affidavit that she would have preferred the food preparation position. Bellson Aff. at ¶ 4. Accordingly, the personnel action opposed by Talanda moving Bellson to an equivalent position elsewhere in the restaurant, was not a materially adverse employment action.

C. Neither Error was Reasonable

However, the mere fact that Talanda was wrong about whether he was acting in opposition to an unlawful employment practice is not sufficient to defeat Talanda's retaliation claim: A person sincerely opposing an employment practice he believes is illegal can be wrong in his belief and still be protected from retaliation by his employer. "The plaintiff need not establish that the action she was protesting was actually an unlawful employment practice; but rather only that she had a reasonable belief that the action was unlawful." *Jennings v. Tinley Park Community Consolidated School Dist. No. 146,* 864 F.2d at 1368, 1372 (7th Cir. 1988).

Unfortunately, the courts have been unclear on how this reasonableness standard should be applied to mistaken beliefs regarding the law.[4] Certainly, the rule

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[4] Additionally, the Court finds some confusion as to the standard for "reasonableness." Citing *Holland v. Jefferson Nat.*

(continued...)

applies to reasonable mistakes of fact. *See Hearth v. Metropolitan Transit Commission,* 436 F. Supp. 685, 688 (D.Minn. 1977) ("appropriate informal opposition to perceived discrimination must not be chilled by the fear of retaliatory action in the event the alleged wrongdoing does not exist"). Additionally, the Seventh Circuit has indicated the rule applies where the law is uncertain. *Berg v. Lacrosse Cooler Co.,* 612 F.2d 1041, 1045 (7th Cir. 1980) ("The plaintiff here was an educated and informed layperson who should not be burdened with the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute.") Left uncertain is where a layperson makes a "reasonable" mistake of law, for instance where a "reasonable person" not versed in the law could believe a practice to be illegal, but, in fact, the practice is unambiguously legal.

Generally, such mistakes of law are not excused. Ironically, Talanda himself recites this staple of black letter law, but applies it only to defendants, not plaintiffs, Pl.

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[4] (...continued)
Life Ins. Co., 883 F.2d 1307, 1314 (7th Cir. 1989), the Magistrate uses an "utterly baseless" standard; that is, plaintiff's belief is reasonable only if it is not utterly baseless. The Court doubts this is the correct standard. For instance, if a belief is merely "baseless" is it to be considered reasonable? Despite the use of the term "utterly baseless" by the Seventh Circuit, the Court would be surprised to learn that the terms "reasonable" and "not utterly baseless" are synonymous. The first court using the term "utterly baseless" in reference to retaliation claims appeared to be holding that the plaintiff's "utterly baseless" belief fell well short of "reasonable," so the Court did not need to determine exactly where the line needed to be drawn. Accordingly, the Court applies a more conventional test for "reasonableness," the ordinary person standard of tort law.

Resp. Def. Obj. to R&R at 4 ("Knowledge of the law must be imputed to defendant [ ] just like each and every other individual defendant is required to know the law.") In the context of ADA retaliation cases, such a rule would allow employers who are well-versed in the law to avoid retaliation suits by simply acting within the law. Hence, the rule would encourage employers to both learn the law and obey it, both effects obviously advancing the purposes of the ADA. Therefore, application of the general rule would seem appropriate. However, application of the general rule may also have a "chilling effect" on opposition efforts. Where a potential opponent of discrimination suspects, but does not know, a practice is illegal, he would be less likely to oppose the practice where he may suffer adverse actions by his employer and be unprotected by the statute. Thus, the general rule may decrease opposition activity, potentially hindering ADA compliance efforts. However, a potential opponent could tailor his actions according to his own lack of knowledge. If he does not know a practice is illegal he could take less aggressive actions than those taken by Talanda for instance, such as inquiring at the personnel office or calling the EEOC to determine whether the action is indeed illegal.

Fortunately, the Court finds this ambiguity in the "reasonable belief" doctrine is inconsequential in this case; the Court finds Talanda's mistakes were not reasonable regardless of whether reasonable mistakes of law are excusable. Therefore, the Court need not address this issue.

In the case that the general rule applies, and plaintiffs seeking protection are charged with knowing the law, none of the above-discussed mistakes are reason-

able. The case law is quite clear that Bellson's injury does not amount to a disability under the ADA. Similarly, the case law is clear that an employer does not regard a person as disabled merely by declaring them unfit for a single job. Finally, moving Bellson has none of the indicia of a materially adverse employment action.[5] Thus, Talanda was clearly wrong on each of these issues; none fell into legal grey areas, the concern of the *Berg* and *Holland* courts, or are "close calls." With respect to each issue, Talanda knew all the relevant facts, but apparently incorrectly concluded that Overly's directive amounted to illegal discrimination. For these reasons, if Talanda is accountable for knowing the law, a reasonable jury could not find that Talanda's mistakes were reasonable, whether the standard for reasonableness is an "ordinary person" standard or an utterly baseless" standard.

Furthermore, the Court finds Talanda's mistakes were clearly unreasonable under a layperson, "common sense" standard. Bellson's injury, which was readily reparable, had little impact on her, aside from impairing her smile. If Bellson's accident had resulted in two black eyes rather than "mangled dentition," moving her off the service line until she recovered surely would not be considered disability discrimination. But for the purposes of disability discrimination, the Court sees no difference between two black eyes and a few missing teeth. Both are minor cosmetic injuries of a temporary nature which do not limit major life functions. Both fall far short of amounting to the type of disabilities covered by

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[5] One might argue, however, that applicability of the materiality requirement was (or is) unsettled.

the ADA. Indeed, the argument that the ADA extends to such minor injuries unjustly trivializes the impact of genuine disabilities on the lives of disabled persons.

Likewise, a "reasonable person" would view the order in question as a minor slight to Bellson insufficient to trigger a violation of the ADA. Talanda was not ordered to fire or demote Bellson for her impaired smile, but to move her to an equivalent position which did not require public smiles. Talanda in fact, admits that he had no idea whether Overly's instructions violated the ADA. (Def. 12(M) Statement ¶¶ 7, 17.) Yet he did nothing to find out before he acted, such as asking KFC's personnel office or the EEOC. Therefore, Talanda's mistake was not reasonable in terms of common sense, either.

Therefore, the Court finds that a reasonable jury could not find that Talanda's mistakes were reasonable. Consequently, the Court finds Talanda fails to establish a genuine issue of material fact and Defendant is entitled to judgment as a matter of law.

D. Opposition Methods not Reasonable

Additionally, the Court finds no genuine issue of material fact as to whether Talanda's methods of opposing the alleged discrimination were reasonable: They were not. Unreasonable acts of opposition are not protected. *Jennings*, 864 F.2d at 1372. Accordingly, the employer may "discipline an employee whose conduct is unreasonable, even though borne out of legitimate protest," without violating the ADA. *Id.; McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973). Thus, as Talanda's acts were unreasonable, he does not have an ADA claim against KFC.

The Court's conclusion that Talanda's opposition acts were not reasonable is based on a number of factors; each factor alone may not be enough to conclude that Talanda's acts were unreasonable, but in combination are more than sufficient. In essence, Talanda's lack of candor and surreptitious methods unnecessarily undermined the managerial effectiveness of himself and Overly and created intrigue and suspicion where none was necessary. Although each of these effects may be inherent in opposition activities to some extent, Talanda's methods unnecessarily exacerbated them to an unreasonable extent.

First, Talanda was unnecessarily insubordinate in the manner he opposed Overly's directive. When Overly gave Talanda the oral directive to move Bellson, Talanda questioned it, but ultimately accepted it. Then he failed to carry it out, keeping Bellson on the service line, neither telling Overly he would not carry out her order nor taking the matter to Overly's supervisor, Malloy, or anyone else. He states he was hoping the matter would just go away. Yet, he told Bellson he would fight the move, even if it meant he would be fired. Furthermore, Overly had given the directive twice, and the second time Talanda secretly tape-recorded the conversation. His own actions indicate he did not think the matter would just go away as he now claims. Therefore, telling Overly he would do as she directed, but then simply not doing it, was unnecessarily insubordinate.

Second, by secretly recording the telephone conversation and replaying it for Bellson, Talanda unnecessarily created a climate of intrigue and suspicion, undermining both his and Overly's authority. Although both Bellson and Talanda appeared to believe making the recording

was illegal, *see* Bellson Dep. at 19-20, it most likely was not. Under Illinois law at the time of these events, a party to a conversation could record the conversation, *People v. Herrington*, 645 N.E.2d 957, 958 (Ill. 1994),[6] and federal law only bans such recordings if the purpose is criminal or tortious. 18 U.S.C. § 2511(2)(d). Although apparently legal, making the recording and, most importantly, replaying it to Bellson was unduly inflammatory and provocative. As Bellson's reaction suggests ("Ain't that illegal?", Bellson Dep. at 19), making the recording is a noteworthy act, one which reflects distrust of and disloyalty to the other party to the conversation. But replaying it, in circumstances virtually certain to result in widespread disclosure of the recording and the conflict between Overly and Talanda, was unnecessary for Talanda to oppose the alleged discrimination against Bellson. She did not need to be informed of Overly's directive at all in order for Talanda to prevent the discrimination, but if he were to inform Bellson he could have used less provocative means. He simply could have told Bellson of Overly's directive and asked her if she wanted him to oppose it. Revealing the fact that he recorded the conversation and the exact contents of the conversation, such as his acceptance of Overly's directive, did not serve a legitimate opposition purpose. As a reasonable person would expect Bellson

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[6] In 1994, however, the Illinois legislature amended the relevant statutes so as to make illegal recording such conversations without consent of all the parties to the conversation. 720 ILCS 5/14-1(d). The amendments do not apply to Talanda's recording, however, as the recording was made before the effective date of the amendments, December 15, 1994. *People v. Siwek*, 1996 WL 523315 at *5 (Ill. App. 2nd Dist. Sept. 16, 1996).

would relay this kind of inflammatory information to other employees, playing the tape for Bellson would bring the conflict between Overly and Talanda into the open, undermining the authority and effectiveness of both.[7] Of central importance, Talanda's deceptive tactics would be revealed, informing all the restaurant's employees of Talanda's insubordinate acts and apparent disloyalty, as well as Overly's ill-advised commentary on Bellson's dentition.

But perhaps most importantly, Talanda never told Overly or Malloy why he was refusing to carry out Overly's order in an effort to explain himself.[8] Although he was in a management position charged with enforcing KFC rules, including its rules against discrimination, he never gave voice to his apparent concern about the discrimination against Bellson. By raising the issue, he may have defused the issue. His claim might have been investigated and resolved to his satisfaction. Indeed, Malloy testifies he had never considered whether Overly's directive violated the ADA. (Malloy Dep. at 39.) But more importantly, Talanda could have explained why he had acted as he had, especially his disobedience with

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[7] Indeed, the evidence is clear that the employees did know of the tape and the discrimination issue before Talanda was terminated. Besides, it is undisputed that Overly learned of the tape's existence prior to terminating Talanda. Obviously, somebody must have told her about it.

[8] As the Magistrate judge writes, "When Talanda arrived [at the meeting], he admitted to disobeying Overly's order to move Bellson but chose not to explain his actions. In fact, at no time prior to termination did Talanda inform KFC that he believed Overly's instructions to be illegal or improper." R&R at 7 (citations omitted).

respect to the Overly directive and his taping of the conversation. Instead, Talanda silently disobeyed Overly's order, not explaining why he was doing so and allowing his superiors to speculate as to his motives.

Despite KFC's contention to the contrary, KFC had sufficient knowledge that discrimination was at issue for the knowledge element of Talanda's retaliation claim to be satisfied, at least for the purposes of this motion. Overly learned of the discrimination issue through a discussion with Bellson after Overly had learned of Talanda's recording. However, the same discussion which gave KFC knowledge of the discrimination also gave KFC reason to question Talanda's loyalty and motives in the affair. As both Bellson and Overly testify, Bellson told Overly that Talanda was pursuing a scheme to sue KFC for a "million dollars" for discrimination and that Talanda repeatedly and excitedly talked about how much money they could make. (R&R at 6.) Talanda disputes that he actually said such things, but he does not dispute that Bellson told Overly this story. Additionally, another manager in Overly's territory told her that Talanda intended to "get her fired", (*Id.*), a goal for which the tape would be potentially valuable. Hence, Overly and Malloy had strong grounds to doubt Talanda's motives and intentions.

Talanda, however, did nothing to dispel those doubts. He did not explain to either Overly or Malloy that he was acting in opposition to discrimination against Bellson much less explain why he thought obeying Overly's directive would amount to illegal discrimination. (Talanda Dep. at 276.) He never told Overly he thought her directive was discriminatory. He never told Malloy that he failed to obey Overly's directive because he thought

it would be illegal. Malloy testifies that he called the meeting with Overly and Talanda to find out if Talanda had a reasonable explanation for his apparent insubordination. (Malloy Dep. at 37.) Malloy acknowledges that failing to carry out an illegal order is not insubordination, and states he may have given Talanda a warning had Talanda offered a reasonable explanation for his actions. (*Id.* at 37, 39.) But Talanda did not provide such an explanation, even though he could hardly assume it was all obvious, not knowing himself whether the directive amounted to discrimination. Furthermore, he did not reveal the tape as evidence of Overly's directive and the reason for his apparent insubordination. His silence adding to the suspicion, Talanda did nothing to allay the legitimate doubts of Overly and Malloy and probably attenuated them.

Talanda defends his failure to explain himself by claiming "he felt that Ms. Overly represented the entire KFC operation and, since she had referenced QSC ratings, Plaintiff felt that KFC shared Overly's view of Ms. Bellson." Talanda Rule 12(M) at ¶ 26. However, Talanda offers no support for these beliefs. KFC points out it has an "open door" policy designed to deal with such matters. Despite fifteen years of experience with the KFC organization, Talanda offers no reason why he did not avail himself of that policy. Furthermore, Talanda does not explain how a policy encouraging cashiers to smile implies KFC's support for discrimination against persons with disabilities. Finally, his final meeting was not with just Overly, but also included Malloy, Overly's superior. Malloy's presence indicates Overly was not a final authority in the matter. In short, Talanda's explanation for why he failed to inform his superiors that he was opposing discrimination is entirely inadequate.

In light of Talanda's incorrect (and unreasonable) belief that Bellson was a victim of discrimination, Talanda's choice of duplicitous opposition tactics, and Talanda's failure to explain his actions when confronted, the Court finds that a reasonable jury could not conclude that Talanda's actions in opposition to Overly's directive were reasonable. Accordingly, KFC's termination of Talanda is not illegal under the ADA and Defendant is entitled to judgment as a matter of law.

III. Remaining State Law Counts

Having dismissed all claims over which the Court has original jurisdiction, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claim. 28 U.S.C. § 1367(c)(3). Although the Magistrate Judge has fully reviewed the counts and recommended summary judgement for Defendants, suggesting possible economics by considering Defendant's motion on its merits, this Court is mindful of the Supreme Court's admonition that if the federal claims are dismissed before trial, then the state claim's should be dismissed as well. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1972).

IV. Parties' Objections to R&R

In light of the above discussion, both of Plaintiff's Objections to the R&R are rendered moot. Plaintiff first objects to the Magistrate Judge's analysis of his case under the *McDonnell-Douglas* framework for indirectly proving discrimination. As the Court's reasoning is independent of the method of proof, the Magistrate Judge's

use of the *McDonnell-Douglas* indirect method of proof, rather than the direct method, is immaterial. Likewise, the Magistrate's recommendation that summary judgment be granted to Defendant on Plaintiff's claim for intentional infliction of emotional distress is moot in light of the Court's ruling that all state law counts are dismissed without prejudice. Therefore, the Court denies Plaintiff's objections as moot.

To the extent the Court did not incorporate Defendant's objections into the above discussion, the Court also denies Defendant's Objections as moot, the Court having granted summary judgment on the ADA count.

IV. Conclusion

For the foregoing reasons, the Court finds Defendant is entitled to judgment as a matter of law and GRANTS Defendant's Motion for Summary Judgment for Defendant and against Plaintiff as to the Plaintiff's ADA claim, Count I. The Court also dismisses all the remaining counts without prejudice, thereby terminating this action.

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

DATED: March 31, 1997